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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether admiralty jurisdiction under the Death on the High Seas Act (DOHSA) requires a nexus to a traditional maritime activity as well as a marine locus.

II. Whether DOHSA or the general maritime law precludes application of a state survival statute, especially when there otherwise is diversity jurisdiction.

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IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Margaret Mayer, individually and as Executrix of the Estate of James E. Mayer, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-21) is not reported. One opinion of the district court (App. 49-76) is reported at 909 F.Supp. 81; the others (App. 22-34; App 38-40; App. 41-8; App. 77-200) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 8, 1997 (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 761 of the Death on the High Seas Act ("DOHSA"), 46 U.S.C § 761, provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

The Seventh Amendment to the Constitution of the United States, U.S. CONST., amend. VII, provides in pertinent

part that "[i]n suits at common law * * * the right of trial by jury shall be preserved."

STATEMENT

A. Factual Background

James E. Mayer died on March 14, 1990 while snorkeling off the southwestern coast of Costa Rica. He and his wife, petitioner Margaret Mayer, were on a land-based birdwatching tour purchased through the Cornell Laboratory of Ornithology and operated by David Blanton, d/b/a Voyagers International. Laura Brown, an employee of the Laboratory, accompanied the tour to assist Voyagers' tour leader, Ken Rosenberg. The Marenco Biological Station of Costa Rica, which has no affiliation with Cornell University, conducted the snorkeling excursion and owned and operated the boat which carried the Cornell group to the snorkeling site.

The planned itinerary of the tour did not include snorkeling at Marenco. However, when the tour arrived at Marenco, the Station invited the members of the tour group to participate in an already-scheduled snorkeling excursion. Rosenberg, after consulting with Brown, offered the group the opportunity to go snorkeling. Neither Rosenberg nor Brown made any inquiry into safety precautions,

or into the snorkeling experience and ability of the tour members. Rosenberg and Brown decided that he would stay on the boat, and Brown would go into the water with the snorkelers.

A Marenco employee offered information concerning currents and pointed out the general area for snorkeling. As agreed, Brown went into the water with the snorkelers, including James Mayer, who was observed some time later swimming alone toward the shore. Upon Brown's return to the boat some fifteen minutes later, it was noticed that James Mayer had disappeared. His body was later found floating in the water near the shore. Petitioner brought a diversity action for, among other claims, negligence resulting in wrongful death, including a survival claim, in the United States District Court for the Northern District of New York on February 14, 1992.[1]

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[1] The defendants included Cornell, Brown, Blanton d/b/a Voyagers, Rosenberg, and Horizontes, a Costa Rican tour operator. Petitioner entered into a stipulation of settlement with Voyagers and Rosenberg, and a stipulation of discontinuance with Horizontes; only Cornell and Brown remained as defendants when the case was tried. Petitioner and

B. The Proceedings Below

Upon Cornell and Brown's motion to dismiss or, in the alternative, for summary judgment, the district court ruled that petitioner's wrongful death claim was governed by DOHSA and her remaining claims, by general maritime law. App. 28; App. 36. The court, relying on Friedman v. Mitsubishi Aircraft International, Inc., 678 F.Supp. 1064 (N.D.N.Y.1988) and Kunreuther v. Outboard Marine Corp., 757 F.Supp 633 (E.D.Pa.1991), ruled that the two-prong test for admiralty jurisdiction laid out in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) did not apply to actions under DOHSA, holding that "the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction." App. 27.

After petitioner filed an amended complaint, Cornell and Brown again moved for judgment on the pleadings or, in the alternative, summary judgment. Although the court granted the motion in part, petitioner's wrongful death and survival claims remained. The court ruled that

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her decedent were residents of Pennsylvania; Cornell, Brown, and Voyagers were residents of New York, and Rosenberg, a resident of Louisiana.

DOHSA and the survival statute of New York would govern her claims. App. 39.

On April 15, 1995, the district court determined that the case would be tried to a jury. In the court's view, nothing in DOHSA or the general federal maritime law precluded petitioner's state survival claim, and when claims carrying the right to a jury trial are joined with admiralty claims, those claims may be tried before a jury. App. 44. However, just prior to December 4, 1995, the scheduled trial date, the case was transferred to a different judge, who heard argument on Cornell and Brown's belated motion for reconsideration of the April 15th ruling.

The court granted the motion for reconsideration. Relying, as it was constrained to do, on the decisions of the Court of Appeals for the Second Circuit in Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F3d. 1084 (2d Cir. 1993) and in Preston v Frantz, 11 F.3d 357 (2nd Cir. 1993), which had ruled that the existence of a general maritime survival claim necessarily precluded a state survival action, the court concluded that both petitioner's wrongful death and survival claims were claims in admiralty. Accordingly, petitioner was not entitled to a jury trial. App. 65-72.

Following the two-week trial, the court directed the parties to submit post-trial briefs addressing only the issue whether Cornell and Brown owed a legal duty to plaintiff or her decedent. On April 16, 1996, the district court, finding no duty, ordered judgment entered in favor of the defendants. App. 200.

Petitioner appealed to the Court of Appeals for the Second Circuit, which affirmed the district court by summary order. In that order, the court reaffirmed its previous holding in Preston that the development of a general federal maritime survival action precluded state survival claims. Regarding petitioner's DOHSA claim, the court of appeals stated that the nexus requirement is a prerequisite for admiralty jurisdiction only in the absence of a statute to the contrary and DOHSA was such a statute; and, in any event, the requisite nexus existed here because "the accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers." App. 20.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with those of other circuits, and of this Court, on two important

questions on which there has been a proliferation of conflicting decisions: (1) whether admiralty jurisdiction under DOHSA requires a nexus to a traditional maritime activity as well as a marine locus; and (2) whether DOHSA or general maritime law precludes application of a state survival statute, especially where there otherwise is diversity jurisdiction. The need for this Court's guidance here is acute. The decision below is erroneous, and the issues addressed are important, recurrent, and involve important principles of federal law.

NEXUS

I. THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE THIRD AND ELEVENTH CIRCUITS REGARDING WHETHER ADMIRALTY JURISDICTION UNDER DOHSA SOLELY DEPENDS UPON THE "LOCALITY" RULE, OR WHETHER A COURT MUST ALSO FIND A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARINE ACTIVITY.

In Executive Jet, this Court abandoned the traditional "locality of the wrong" test for admiralty jurisdiction and instead imposed a two-pronged query: whether the incident took place in navigable waters, and whether it bore a relationship to traditional maritime activity. In its construction of Executive Jet, the decision below squarely conflicts with that of the Third Circuit

in Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F.Supp. 1277 (W.D.Pa.1983), affd 738 F.2d 423 (3rd Cir. 1984), cert. denied, 469 U.S. 858 (1984), and with that of the Eleventh Circuit in Miller v. United States, 725 F.2d 1311 (11th Cir. 1984), cert. denied, 429 U.S. 821 (1984). Each case involves a wrongful death occurring more than a marine league from the United States shore, and each case considers whether DOHSA claims require a finding of a maritime nexus, or a significant relationship to traditional maritime activity. By applying the Executive Jet test to the DOHSA claims before them, the Third and Eleventh Circuits effectively hold that a claim under DOHSA must satisfy the nexus text. The court of appeals, however, by summarily affirming the district court's decision, concludes that the nexus test does not apply to DOHSA claims. The conflict is compounded by the Ninth Circuit's determination that relies exclusively on locality to confer admiralty jurisdiction on DOHSA claims, without even considering whether Executive Jet's maritime nexus requirements apply. Howard v Crystal Cruises, Inc., 41 F.3d 527 (9th Cir. 1994). Executive Jet states that its two-pronged test applies in the absence of "legislation to the

contrary," and some courts have concluded, without much examination of either Executive Jet or DOHSA itself, that DOHSA is such a statute.

The district court, in ruling that Executive Jet exempts DOHSA claims from the requirement of a traditional maritime nexus, failed to recognize that the holding of Executive Jet itself was limited to aviation torts, and that the case did not, in fact, involve a DOHSA claim. Only after this Court had found a maritime nexus for airplane crashes on the high seas -- concluding that planes carrying passengers over international waters fulfill a function once solely provided by ships -- did the Court append the two footnotes to Executive Jet upon which the district court here relied. In the first, the Court commented that "under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court." 409 U.S. at 271, n. 20. In the second, the Court considered domestic flights involving passage over the high seas and commented, "[t]o the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is

'legislation to the contrary'." 409 U.S. at 274, n. 26. But these comments are predicated on Executive Jet's finding of a traditional marine nexus for passenger flights over the high seas.

Moreover, the district court overlooked that in Preston, the Second Circuit itself cited with approval the Eleventh Circuit's Miller opinion and, after analyzing a helicopter crash on the high seas, found sufficient nexus to traditional maritime activity to support admiralty jurisdiction under DOHSA. Instead, the district court, without analysis, simply adopted two distinguishable district court cases that are themselves analytically sparse.

The court in Friedman v. Mitsubishi Aircraft International, Inc., 678 F.Supp. 1064 (S.D.N.Y. 1988) concluded that the Executive Jet test is not applicable to an action brought under DOHSA simply by stating conclusorily that DOHSA was one of the statutes "to the contrary" that made it unnecessary to engage in the Executive Jet analysis, without discussing why this might be so. Relying solely on Friedman, the court in Kunreuther v Outboard Marine Corp., 757 F.Supp. 341 (D.N.J. 1995) reached the same conclusion.

In stark contrast, the Third and Eleventh Circuits hold that DOHSA confers

admiralty jurisdiction only if the court finds a nexus between the claim and traditional maritime activity, relying on this Court, rather than unsupported district court decisions, for precedent. In Miller, the Eleventh Circuit stated that "[a]ny determination of whether a tort is or is not within maritime jurisdiction begins with the Supreme Court's test for admiralty torts, enunciated in Executive Jet Aviation v. City of Cleveland [citation omitted]." Miller, 725 F.2d at 1313. The Miller court noted that Executive Jet required more than a finding of maritime locality to establish jurisdiction under DOHSA for aviation tort cases. Because the exclusive use of locality as the test for admiralty jurisdiction presented serious problems in cases not involving a significant relationship to traditional maritime cases, such as aviation and swimming tort cases, the locality of the wrong is not nearly as important as whether the "wrong bears a significant relationship to traditional maritime activity" in such borderline cases. Id.

The Third Circuit summarily affirmed without opinion the decision requiring a DOHSA nexus determination in Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F.Supp. 1277 (W.D.Pa. 1983), aff'd 738

F.2d 423 (3rd Cir. 1984), involving a DOHSA claim arising from a scuba-diving accident on the high seas. The district court concluded that, under Executive Jet, DOHSA provided a basis for admiralty jurisdiction "so long as there is a nexus with traditional maritime activity and, as here, a vessel on the high seas is involved." Kuntz, 573 F.Supp. at 1280.

Other district courts conflict in the interpretation and application of Executive Jet, and in particular footnotes 20 and 26, to DOHSA claims. Some mechanically apply DOHSA's strict locality rule without considering a maritime nexus (see, Pierpont v. Barnes, 892 F.Supp. 60 [D.Conn. 1995]; Palischak v. Allied Signal Aerospace Co., 893 F.Supp. 341 [D.N.J. 1995]; Baker v. Bell Helicopter/Textron, Inc., 907 F.Supp. 1007 [N.D.Tex. 1995]. Others hold that a significant relationship to traditional maritime activity must be found before actions may be brought under DOHSA (see, Brons v. Beech Aircraft Corp., 627 F.Supp. 230 [S.D.Fla. 1985]; Moyer v Klosters Rederi, 645 F.Supp. 620 [S.D.Fla.1986]; Hayden v Krusling, 531 F.Supp. 468 [N.D.Fla. 1982]). The need for clarity and uniformity is apparent, and this Court's guidance required.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN RODRIGUE v. AETNA CASUALTY AND SURETY CO.

In Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352 (1969), which involved two deaths occurring on an artificial drilling island located in the high seas, this Court determined that the wrongful death action was not governed by DOHSA despite the location on the high seas, as location alone "is not enough to make [DOHSA] applicable." Rodrigue, 395 U.S. at 359. To supplement the location rule, the Court attempted to find a relation to traditional maritime activity and found none, noting that the accident "had no more connection with the ordinary stuff of admiralty than do accidents on piers." 395 U.S. at 360. Focusing on the importance of the defendant's activities in the nexus determination, Rodrigue stated that where a defendant engages in activities "not even suggestive of maritime affairs," DOHSA does not apply. 395 U.S. at 360-361.

Moreover, Rodrigue states that DOHSA "does not apply of its own force under admiralty principles." 395 U.S. at 355. In other words, a federal court cannot establish admiralty jurisdiction merely by finding that DOHSA's locality rule has been satisfied; a court must first establish an independent basis for subject

matter jurisdiction in admiralty. Nevertheless, directly conflicting with Rodrigue, the court of appeals here assumes, with no support other than its idiosyncratic interpretation of Executive Jet and two weak district court cases, that any death on the high seas falls under admiralty jurisdiction.

III. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE PURPOSE AND SCOPE OF ADMIRALTY JURISDICTION AND THE EXTENT TO WHICH THIS COURT MAY REMEDY ANACHRONISMS IN CONGRESSIONAL LEGISLATION

Congress enacted DOHSA in 1920 to provide uniformity in the maritime laws by creating an action for wrongful deaths occurring on the high seas. Executive Jet, 409 U.S. at 249. State wrongful death actions at that time extended only to territorial waters, and there was no cause of action under federal admiralty common law for deaths on the high seas. The locality test incorporated without discussion into DOHSA was at that time the exclusive test for admiralty jurisdiction. But then, and now, courts have questioned the rationale for mechanical application of the locality rule, especially when faced with "borderline" claims involving a marine locality but no connection with

either a water-borne vessel or traditional maritime activities. 409 U.S. at 254-56.

Nothing in DOHSA's legislative history, or Congress' intent at the time it enacted DOHSA, or even in the language of DOHSA itself, precludes a court today from applying to DOHSA claims the nexus test already required under general federal admiralty law. Congress intended to unify admiralty law when it enacted DOHSA, filling a gap in the common law by providing a wrongful death action where none was available and enabling similarly situated plaintiffs to be similarly treated. As this Court has stated, "[n]othing in the [Death on the High Seas] Act * * * could be read to preclude this Court from exercising its admiralty power to remedy nonuniformities that could not have been anticipated when those statutes were passed." Miles v. Apex Marine Corp., 498 U.S. 19, 26-27 (1990).

The consequences of whether the law of admiralty or state law is applied are significant, in terms of available causes of action, damages, jury trials and procedure. Currently, the only factor determining whether similarly situated plaintiffs in DOHSA actions will experience substantially different judicial process is whether the case is heard in admiralty or under state law.

Like the Second Circuit, courts adhering strictly to DOHSA's locality test apply admiralty jurisdiction with all its attendant consequences, even if the incidents and defendants bear no connection to traditional maritime activity. Courts following the reasoning of the Third and Eleventh Circuits apply state law if they find no connection with traditional marine concepts.

This Court has not yet considered whether Executive Jet's nexus test extends to non-maritime, non-aviation torts occurring on the high seas. Although this Court has commented that "admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore," it did so only after finding that Executive Jet's nexus requirement had been satisfied. Offshore Logistic, Inc. v. Tallentire, 477 U.S. 207, 218-219 (1986). Similarly, in East River S.S. Corp. v Transamerica Delaval, 476 U.S. 858 (1986), a case involving ships engaged in traditional maritime commerce, this Court noted that "it need not reach the question whether a maritime nexus also must be established when a tort occurs on the high seas, but were there such a requirement, it clearly was met here." 476 U.S. at 863-864. However, substantive decisions

regarding the extent of admiralty jurisdiction belong with this Court, not with the divergent courts below.

IV. THE COURT OF APPEALS MISINTERPRETS AND MISAPPLIES THE MARITIME NEXUS TEST AS DEVELOPED BY THIS COURT IN SISSON v. RUBY, BY FOCUSING ON A NON-DEFENDANT'S MARITIME ACTIVITIES.

The court of appeals commented that even if a maritime nexus were required for cases under DOHSA, DOHSA would still apply to this case because "[t]he accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers." App. 20. This rationale misstates the nature of the activities giving rise to petitioner's wrongful death action, and flouts a line of this Court's cases that have further refined Executive Jet's test for maritime nexus.

Petitioner claims that her husband died during the snorkeling activity as a result of Cornell and Brown's failure to exercise a duty of care toward the tour participants as, respectively, the tour arranger and the tour assistant. These defendants did not control the boat, did not control the crew, and did not control the snorkeling trip. In other words, the charges leveled against the defendants, and the defendants themselves, have no

connection with traditional maritime activity.

In Sisson v Ruby, 497 U.S. 358 (1990), this Court refined the Executive Jet test for admiralty jurisdiction. First, a court must determine whether the accident occurred on navigable water, and second, whether the accident had a connection with maritime activity. Under this second inquiry, the court must first assess the "general features of the type of incident involved" to determine whether the incident has "a potentially disruptive impact on maritime commerce," and second, the court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." 497 U.S. at 363-365.

Applying Sisson's test to the facts of this case, petitioner does not dispute that the accident met the locality requirements. But where, as here, the accident involves recreational swimming in sheltered coastal waters far from shipping lanes, the potential for disruption is minimal. The general character of the activity is the recreational snorkeling of land-based tour participants while under the aegis of official tour personnel. The duty of a land-based tour leader or assistant toward tour participants has

nothing to do with traditional concepts of maritime activity.

As this Court subsequently stated in Grubart, Inc. v. Great L.D. & D. Co., 513 U.S. 527 (1995), Sisson's nexus test turns on "the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity in a given case * * *." The substantial relationship test is satisfied when at least one alleged wrongdoer is engaged in traditional maritime activity, and that maritime activity is alleged to be the proximate cause of the accident. The inquiry into the general character of the activity focuses on the defendants' roles in the incident and on the specific charges brought against them, not on the maritime activities of non-defendants. Where, as here, the defendants were not engaged in traditional maritime activity, there is no basis for admiralty jurisdiction.

STATE SURVIVAL ACTIONS

V. THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE POSITION OF THE THIRD CIRCUIT REGARDING THE AVAILABILITY OF STATE LAW SURVIVAL ACTIONS

The Court of Appeals for the Second Circuit here sustained the ruling of the district court that the availablity of a

maritime survival action precludes a survival claim brought under a state survival statute.[2] In sustaining that ruling, the court of appeals is in conflict with the position taken by the Third Circuit, and with the rationale of this Court's recent ruling in Yamaha Motor Corp., U.S.A., v. Calhoun, __ U.S. __, 116 S.Ct. 619 (1996). Further, it ignores the

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[2] The circuits and districts have concluded, although not unanimously, that by analogy to Moragne, infra, general maritime law also provides a general maritime survival action, in which non-pecuniary damages may supplement DOHSA recovery. Azzopardi v Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); Barbe v Drummond, 507 F.2d 794 (1st Cir. 1974); McAleer v Smith, 791 F.Supp. 923 (D.R.I. 1992); Favaloro v S/S Golden Gate, 687 F.Supp 475 (N.D.Cal. 1987) (all ruling that DOHSA does not preempt general maritime law survival actions); cf., In re Air Crash Disaster Near Honolulu, Hawaii, 792 F.Supp. 1541 (N.D.Cal. 1990) (DOHSA preempts general maritime survival action for nonpecuniary damages.) In Miles v. Apex Marine Corp., 498 U.S. 19 (1990), this Court discussed, but declined to decide, whether there existed a general maritime survival action. Id. at 33-34.

separate Seventh Amendment basis for jurisdiction of the state claim arising out of the diversity of the parties, which guarantees the preservation of the common law claims. Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Atlantic & Gulf Stevedores, 369 U.S. 355 (1962).

In Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir.1993), cert. denied, 510 U.S. __, 114 S.Ct. 317 (1990), the court of appeals had previously held that this Court's creation in Moragne v. States Marine Lines, Inc., 398 U.S. 417 (1970), of a federal wrongful death action under general maritime law precluded resort to state wrongful death statutes in marine death claims. Subsequently, in Preston v. Frantz, 11 F.3d 357 (2d Cir.1993), the court of appeals further concluded that the recognition and development of a similar general marine survival action by many of the federal courts similarly precludes resort to state survival statutes in marine death claims. Accordingly, the district court here ruled, and the court of appeals agreed, that any survival claim brought by the petitioner was of necessity a claim under the general maritime law.

The Third Circuit, however, has long taken the position that DOHSA may be supplemented by a survival action brought

under state law. Shortly after Moragne, the Third Circuit decided in Dugas v. National Aircraft Corp., 438 F.2d 1386 (1971) that, where DOHSA applies, that statute provides the sole basis for recovery for wrongful death; however, DOHSA does not preempt "the separate and distinct remedy [for pre-death pain and suffering] encompassed in state survival statutes." The Third Circuit reaffirmed its position in Kuntz v. Windjammer "Barefoot" Cruises, 738 F.2d 423 (1984), cert. denied, 469 U.S. 858 (1984). See also, Palischak v. Allied Signal Aerospace Co., 893 F.Supp. 341 (D.N.J. 1995).

VI. THE DECISION OF THE COURT OF APPEALS THAT THE DEVELOPMENT OF A GENERAL MARITIME SURVIVAL ACTION PRECLUDES STATE SURVIVAL ACTIONS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The ruling of the Second Circuit here finds no support in this Court's reasoning and decisions. This Court has settled that DOHSA, by its terms, precludes recovery of non-pecuniary damages for wrongful death on the high seas. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Offshore Logistics, Inc. v Tallentire, 477 U.S. 207 (1986). Higginbotham and Tallentire, however, did not address the issue whether a claim under DOHSA could be accompanied by a

survival action for pre-death pain and suffering, and at the time this case was before the district court, no clear federal rule had emerged on the extent to which state survival statutes apply under either DOHSA or under the general federal maritime wrongful death action.

The sole authority and rationale provided by the court of appeals is this Court's concern in Moragne with what the court of appeals characterizes as "the tensions and discrepancies" resulting from the application of state law. This partial quotation, however, misrepresents the true concern of Moragne, which is not for uniformity per se, but for the "tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." Moragne, 398 U.S. at 401 (emphasis added).

Moragne was occasioned in part by the emergence of strict liability for unseaworthiness as a primary basis for recovery for seafarers' injury or death. 398 U.S. at 399. Because of the difference between this strict liability standard and the traditional negligence standard for state wrongful death actions, the breach of an identical duty could ground liability on the high seas but not within the territorial waters of a state

that did not recognize a claim of unseaworthiness as a basis for tort liability. This anomaly -- and particularly because it involved the "exclusively maritime substantive concept" of unseaworthiness -- led to this Court's creation of a general maritime action for wrongful death, where none had existed before. 398 U.S. at 401.

In Yamaha Motor Corp. v. Calhoun, 516 U.S. __, 116 S.Ct. 619 (1996), which concerned the application of state remedies to the death of a nonseafarer in territorial waters, the Court asked whether the existence of a federal maritime claim for wrongful death precludes all other remedies for nonseafarers. The Court noted that, prior to Moragne, the federal courts of admiralty "routinely applied state wrongful death and survival statutes in maritime accident cases," and queried "whether Moragne should be read to stop that practice." Yamaha, 116 S.Ct. at 624[3]

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[3] Although Yamaha speaks almost exclusively in terms of wrongful death statutes, its rationale was meant to include survival statutes as well. "Throughout this opinion, for economy, we use the term wrongful death remedies or statutes to include survival statutes."

In short, although the seminal and controlling case remains Moragne, the issue as posed by the Court is "not what Moragne added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." 116 S.Ct. at 625, n. 7.

Even before Yamaha, the cases interpreting Moragne rejected the notion that uniformity of law was the primary goal in marine wrongful death cases. Rather, as Moragne itself made clear, the application of state remedies must be rejected only if they impact exclusively maritime substantive concepts, or are inconsistent with substantive federal policies. As the Court pointed out in Moragne, Congress enacted DOHSA to provide recovery only for deaths on the high seas and did not extend it to territorial waters, at least in part because at the time of that enactment the state remedies available for deaths in territorial waters were probably more generous than those provided by DOHSA. The divergent state remedies for death in territorial waters were not offensive to DOHSA because they were in harmony with its policy of providing recovery for all maritime deaths. Moragne, 398 U.S. at 397-398.

Yamaha, 116 S.Ct. at 624, n. 3.

Yamaha reaffirmed the long-standing view that variable state remedies are acceptable if they are "compatible with federal maritime interests," and noted that any uniformity concerns presented by the state remedies invoked in Yamaha were "of a different order" from those that compelled the Court's decision in Moragne. Yamaha, 116 S.Ct. at 626. An exception lies, however, where Congress has enacted a comprehensive recovery scheme, as it has with DOHSA or the Jones Act. In those cases, state remedies must gave way to the recovery allowed by the statute. However, because DOHSA, by its own terms, is limited to the high seas, the Congressional enactment does not preclude the application of state statutes to wrongful deaths in territorial waters.

But DOHSA is similarly limited by its own terms to recovery for wrongful death. Under the rationale of Yamaha, DOHSA should not therefore preclude the application of state survival statutes that provide remedies for pre-death pain and suffering, a cause of action as separate and distinct from that for wrongful death as the high seas are from territorial waters.

Nor, under Yamaha, should these remedies necessarily be displaced by the availability of a general maritime law

survival action, as Yamaha specifically rejected the view that Moragne, in creating a general maritime wrongful death action, had created a "solitary federal scheme" precluding the application of state remedies. The court of appeals here thus errs in failing to recognize that Yamaha completely vitiates its holding in Preston. If the general maritime survival action invoked there by the court of appeals is, as that court would have it, similar to the general maritime wrongful death action created by Moragne, it is similarly subject to the rationale of Yamaha.

One week after this Court rendered its decision in Yamaha, it decided Zicherman v. Korean Air Lines Co., Ltd, 516 U.S. __, 116 S. Ct. 629 (1996). There the Court held that DOHSA provided the substantive law for the measure of damages in an action under the Warsaw Convention involving an airplane shot down over the Sea of Japan, and therefore no recovery could be had for non-pecuniary damages. The Court reiterated the long-standing rule of Higginbotham and Tallentire that where DOHSA applies, neither state law nor general maritime law can provide recovery. However, the only question before the Court in Zicherman was the recovery of damages for wrongful death; the Court

expressly pointed out that it need not and did not address the district court's allowance of pre-death pain and suffering damages, or its grant of a jury trial,[4] as Korean Air Lines in its petition for certiorari had not raised those issues. Zicherman, 116 S.Ct. at 636, n.4. Nevertheless, at least one court, either ignoring or misreading Yamaha, and ignoring the distinction there recognized between a wrongful death action and a survival action, has now read Zicherman as precluding any survival claim for pre-death pain and suffering in a DOHSA case, on the ground that DOHSA provides the exclusive remedy. In Re Korean Air Lines Disaster of Sept. 1, 1983, 935 F.Supp 10 (D.D.C. 1996).

In light of this increasing confusion, the proliferation of conflicting decisions, and the erroneous determination of the court of appeals,

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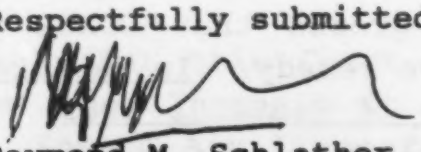
[4] One important consequence of a state survival action is entitlement to a jury trial. If a state claim is brought in diversity and thus has an independent basis for federal court jurisdiction, there is a Seventh Amendment right to a jury trial. Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Atlantic & Gulf Stevedores, 369 U.S. 355 (1962).

this Court should grant certiorari to address the question which it expressly declined to answer in Tallentire and was not asked to determine in Zicherman: whether a DOHSA claim also permits an action and a remedy under a state survival statute, especially when such an action is separately grounded in diversity jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED

961959 APR 8 1997

OFFICE OF THE CLERK

No. __

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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Summary Order of the Court of Appeals, Entered January 8, 1997

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of January, one thousand nine hundred and ninety-seven.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE WILFRED FEINBERG,
HONORABLE JOSEPH M. McLAUGHLIN,
Circuit Judges.

MARGARET MAYER, individually and as Executrix of the Estate of James E. Mayer, Deceased,

Plaintiff-Appellant,

v.

CORNELL UNIVERSITY; LAURA BROWN

Defendants-Appellees.

APPEARING FOR APPELLANT: Raymond M. Schlather, LoPinto, Schlather, Solomon & Salk

Appearing for Appellees: Thomas Mead Santoro, Cornell University, Ithaca, New York

Appeal from the United States District Court for the Northern District of New York (Neal P. McCurn, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the District Court is hereby AFFIRMED.

Mayer v. Cornell University
Docket No. 96-7600

Margaret Mayer, individually and as executrix of the estate of James E. Mayer, deceased, appeals from the April 16, 1996, order of the District Court, directing Judgment for defendants Cornell University and Laura Brown after a two-week non-jury trial on appellant's wrongful death and survival claims. Appellant contends that the District Court erred by (1) finding that the defendants owed no duty to the plaintiff or the decedent, (2) reversing a prior ruling that plaintiff was entitled to a jury trial, (3) applying the Death on the High Seas Act to the wrongful death claim without finding a nexus to traditional maritime activity, and (4) determining that a contractual disclaimer of liability was effective.

In an unfortunate sequence of events,

James E. Mayer ("Mayer") died while snorkeling during a birdwatching group tour in Costa Rica. Cornell's Laboratory of Ornithology sponsored the tour, which was led by Kenneth Rosenberg, and attended by Laura Brown, a research assistant and experience ornithologist employed by and representing Cornell on the trip. Rosenberg was an employee of the tour operator, David Blanton d/b/a Voyagers International ("Voyagers"). The snorkeling boat was owned and operated by the Marenco Biological Station ("Marenco"), a private nature reserve.

Mayer's death occurred a few miles off the Osa Peninsula while the tour was en route to Isla del Cano, an island to the southwest of mainland Costa Rica. Although Voyager's original itinerary of the tour did not include the excursion to

the Isla del Cano, it indicated that snorkeling might be possible during that trip, and encouraged participants to bring their own snorkeling equipment.

Both Cornell and Voyagers had promoted the tour in various brochures and magazines, each at times describing Brown as a tour assistant, a Cornell representative, or a tour leader. Only Rosenberg was consistently referred to by both parties as the tour leader. Aside from the initial promotion of the trip to Cornell's members, Voyagers was responsible for nearly every aspect of the trip, including preparing and disseminating detailed descriptions of the tour, planning the itinerary, arranging for airline tickets, and providing tour participants with brochures, travel tips and a departure checklist. Reservation

forms and deposits for the trips were made out to Voyagers.[1]

As a sponsor of the tour, Cornell was to receive a small percentage of the fees paid by each participant. It appears that Brown's function during the tour was to assist the group members to locate and identify different species of birds, and to help ensure the general comfort of the participants, such as those related to transportation, hotel accommodations, and eating arrangements. In return, she attended the trip free of charge to herself or Cornell, but she received no salary during the trip and had to use her

[1] On the back of the reservation form, Voyagers disclaimed any responsibility or liability in connection with the service of any vessels used during the trip, and extended coverage of the disclaimer to Rosenberg and to Cornell and its agents.

own vacation time to attend.

One day during the trip, Rosenberg learned from a Marenco employee that there would be space available on a Marenco boat going to Isla del Cano. Passengers on the boat would have the opportunity for snorkeling while the boat was en route to the island. Rosenberg presented his group with the option of joining the del Cano day-trip. Although, some participants simply wanted to enjoy the boat ride and not snorkel, all apparently agreed to take the trip.

The del Cano trip occurred the following day. A few members of the Cornell group, including Mayer, and some other Marenco guests and employees, chose to snorkel. Marenco staff operated the boat, assisted passengers to board the vessel, provided snorkeling equipment for

those who did not have their own, and selected the location for the snorkeling. The only snorkeling instructions given to the passengers came from Marenco staff, and were limited to a description of the current, an indication of the general area within which to snorkel, instructions on how to re-board the boat after snorkeling, and the suggestion that snorkelers wear tee-shirts to avoid being stung by organisms in the water. No one instructed the snorkelers or those remaining on the boat on any other safety precautions.

Brown, who had some snorkeling experience, joined the snorkelers in the water, while Rosenberg remained on the boat using binoculars to look for wildlife. Neither Brown nor Rosenberg undertook to watch the snorkelers during the activity, nor to supplement the

instructions given by the Marenco employee.

When Brown last saw Mayer alive he was swimming rapidly, but in no apparent distress, in the direction of the shore. Brown paid no particular attention to him, and resumed her own activity. After the other snorkelers had returned to the boat, they discovered that Mr. Mayer was missing. Sometime later, he was found floating near the shore. Despite efforts to revive him, Mayer did not regain consciousness. The cause of his death remains in dispute.

By order entered April 19, 1995, Chief Judge Thomas J. McAvoy originally ruled that the plaintiff's case would be tried before a jury.[2] However, more than

[2] The case originally involved numerous claims and numerous defendants. After many of the defendants reached

seven months later, and after the case had been reassigned, Cornell and Brown moved for reconsideration of Judge McAvoy's ruling. When the case was officially reassigned to Judge McCurn on December 4, 1995, he heard oral argument on the defendants' motion, and then rejected the prior ruling. Mayer v. Cornell University, Inc., 909 F. Supp. 81 (N.D.N.Y. 1991).

After a two-week bench trial on the wrongful death and survival claims, Judge McCurn directed the parties to submit post-trial briefs on the narrow issue of whether Cornell and Brown owed a duty to the defendants, finding, as a matter of law that neither of the defendants owed a

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settlements with the plaintiff, only Brown and Cornell remained in the action. The subsequent dismissal of some of the claims against these two defendants left only two claims for trial.

duty to the plaintiff or the decedent.

1. Legal duty.

A finding regarding the existence or nonexistence of a duty is a matter of law reviewed by this Court de novo. See, e.g., Andrews v. Metro North Commuter Railroad Co., 882 F.2d 705 (2d Cir. 1989); Northern Tankers (Cyprus) Ltd. v. Backstrom, 934 F. Supp. 33, 39 (D. Conn. 1996). Appellant presents three distinct theories for the argument that the District Court erred in finding that Cornell and Brown owed no duty to herself and decedent: (1) even if the defendants are characterized merely as sponsors of the trip, the extent of their control over the snorkeling imposes a legal duty owed to the members of the group; (2) the defendants voluntarily assumed a duty; and (3) the law of admiralty imposed a duty.

Generally, a sponsor is not liable in the negligence for an injury caused to an event participant if the sponsor has not control over the event and thus is in no position to be able to prevent the injuries. See Johnson v. Cherry Grove Island Mgmt., Inc., 573 N.Y.S. 2d 187, 188 (App. Div. 1991) (citing Vogel v. West Mountain Corp., 470 N.Y.S. 2d 475 (App. Div. 1983)). Nor is a sponsor liable for the negligent acts of third parties controlling the event unless the sponsor has the authority to control the actions of those third parties. Gibbons v. Oswego County, 556 N.Y.S. 2d 428, 429 (App. Div. 1990) (citation omitted).

In this case, the evidence amply demonstrated that neither Cornell nor Brown was in a position to ensure the safety of the snorkeling activity because

neither had any particular expertise in snorkeling, see Vogel, 470 N.Y.S. 2d at 477, and, more significantly, neither had any authority over the actions of Marenco or its employees, Gibbons, 566 N.Y.S. 2d at 429. Indeed, there was no realistic opportunity for Brown, or Cornell in particular, to control the circumstances of the snorkeling because in planning its sponsorship of the tour, Cornell could not have anticipated Marenco's unexpected offer for the group to join the del Cano day-trip. Though appellant contends that Brown, who was listed in some literature as a leader along with Rosenberg, had a duty either to inquire into Marenco's competence or notify the tour members that such inquiry had not been made, the undisputed evidence established that any such duty of inquiry of notification fell

only to Rosenberg. Brown's responsibilities concerned ornithology and assuring that the tour member were satisfied with their travel accommodations.

We see no reason for extending New York law to impose a duty of care on the basis of what appellant characterizes as the "special relationship" between a sponsor and the third party controlling an event, or between a sponsor and the event participants. See Kazanoff v. United States, 945 F.2d 32, 26 (2d Cir. 1991) (quoting Purdy v. Public Administrator of Westchester County, 530 N.Y.S.2d 513, 516 (1988)).

A finding that the defendants voluntarily assumed a duty depends on whether their conduct placed the decedent in a more vulnerable position than he

would have been in had the defendants done nothing. See e.g., Heard v. City of New York, 603 N.Y.S.2d 414, 417 (1993). A plaintiff (or a plaintiff's decedent) is placed in a worse position if, for instance, the defendant's conduct either created or enhanced the risk to the plaintiff, or induced the plaintiff to forgo an opportunity to avoid risk. Id.

Such was not the case here. There was no evidence that Brown did anything other than join the other snorkelers in the water for her own enjoyment. At no time did she lead any person in the group to believe that she was assuming a supervisory function over the snorkeling activity or over the Marenco staff. Nor did Cornell, in its promotion of the tour, imply that it would ensure the safety tour participants who should choose to snorkel,

particularly since the snorkeling excursion was an unexpected change of itinerary over which Cornell had no control. There was no assumed duty on the part of these defendants.

Finally, there is no basis for finding that these defendants owed a distinct duty under admiralty law. Even if, as plaintiff contends, industry practice and custom in regard to snorkeling impose a duty to use specific precautions such as pairing strong swimmers with weak swimmers during the activity, plaintiff offers no support for the argument that such a duty should apply to Cornell or Brown, rather than just to Marenco or perhaps to Voyagers.

2. The Motion for Reconsideration

Even if we assume that we may review Judge McCurn's grant of the motion to

reconsider Chief Judge McAvoy's ruling, but see Shrader v. CSX Transportation, Inc., 70F.3d 255, 256 n.1 (2d Cir. 1995), there was no abuse of discretion in rejecting the prior ruling because it was in error. Since jury trials are not available in admiralty actions, the narrow question revisited by Judge McCurn was whether the survival claim arose under state law or admiralty law. Judge McCurn determined that the only survival action the plaintiff could assert would be one arising under admiralty law. 909 F. Supp. at 84-85. This conclusion is supported by this Court's broad language in Preston v. Frantz, 11 F.3d 357 (2d Cir. 1993) stating that "the development of a general maritime law survival action necessarily precludes the application of the state survival statutes." Id. at 358. It was

not an abuse of discretion for Judge McCurn to determine that there was clear error in Judge McAvoy's prior ruling that state law could apply to the survival claim.[3]

3. Death on the High Seas Act

Appellant argues that it was error for the District Court to rule that her wrongful death claim was governed by the Death on the High Seas Act, 46 U.S.C. § 761 et seq. ("DOHSA"). Although she

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[3] No contrary conclusion is compelled by the Supreme Court's recent opinion in Yamaha Motor Corp. U.S.A. v. Calhoun, 116 S.Ct. 619 (1996). The Court there ruled only that state law may supplement the measure of damages for wrongful death even though maritime law otherwise provides the wrongful death cause of action. Because the Court explicitly left open the question of whether substantive state law liability rules would also apply, id. at 628 n.14, it necessarily left undecided the more specific issue of whether they jury trial entitlement accompanying a state law claim would similarly apply.

concedes that the circumstances of Mayer's death clearly fall within the literal language of DOHSA, she nevertheless urges that DOHSA should apply only if the alleged wrong bears a significant relationship to traditional maritime activity. See Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972). In Executive Jet, the Supreme Court emphasized that the nexus requirement is a predicate for admiralty jurisdiction tin cases where there is no controlling statute to the contrary. Id. at 268, 271. DOHSA is specifically mentioned to illustrate such a statute. Id. at 271 n. 20,k 274 n.26. Thus, Chief Judge McAvoy may well have been correct to rule that DOHSA governed the wrongful death claim. But even if DOHSA claims require a nexus to traditional maritime activity,

appellant's claim meets the nexus requirement. The accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers.

4. Joint Venture

Whether the existence of a joint venture is evaluated under New York law or federal law, the facts of this case do not support a finding that the tour was a joint venture undertaking between Voyagers and Cornell. The defendants did not intend to create a joint venture, and it is evident that they intended that Cornell would merely sponsor, and not control, the tour. See, e.g., Sasportes v. M/V Sol de Copacabana, 581 F.2d 1204, 1208 (5th Cir. 1978); McGrath v. United Hospital, 562 N.Y.S.2d 193, 194 (App. Div. 1990) (citing

Mendelsohn v. Feinman, 531 N.Y.S.2d 326 (App. Div. 1988)).

5. Disclaimer

Because we conclude that the defendants owed no duty to the appellant or the decedent, we need not rule on the effect of the contractual disclaimer.

Proceedings of February 25, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

MARGARET MAYER, individually, and as executrix of the estate of JAMES E. MAYER, DECEASED,

Plaintiff,

-against-

CORNELL UNIVERSITY, INC., DAVID BLANTON, d/b/a VOYAGERS INTERNATIONAL, HORIZONTES NATURE ADVENTURES, KENNETH ROSENBERG, and LAURA BROWN.

Defendants.

THE COURT: All right. As the Court indicated initially before, this is a motion pursuant to Federal Rules of Civil Procedure 12(c), or in the alternative, for summary judgment under Federal Rules of Civil Procedure 56. And the plaintiff has cross moved, although he didn't mention this in his oral presentation, pursuant to Rule 15(a), to amend his complaint.

And as indicated in oral argument, the primary basis for the defendants' motion to dismiss is that many of the plaintiff's present claims would be preempted if the Court were to impose admiralty jurisdiction, more specifically, the Death on the High Seas Act, over the present claims.

Accordingly, the Court is going to begin its analysis with that question in

mind.

The threshold matter the Court must determine is a choice of law question. The defendants have asserted that because of the location and circumstances surrounding the plaintiff decedent's death, the plaintiff's causes of actions premised on negligence are governed by the Death on the High Seas Act, 46 U.S.C. Section 761 et seq.

Plaintiff counters by asserting the admiralty law is not applicable because the accident did not display the appropriate nexus to traditional maritime activities.

The Death on the High Seas Act reads in relevant part as follows: "Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league

from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the District Court of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued."

Now, the statute permits the maintenance of a wrongful death action by the personal representative of a decedent whose death was caused by negligence which occurs more than one marine league, approximately 3.45 miles, from the shores of the District of Columbia or of any state or territory. See, SEA-LAND SERVICES, INCORPORATED VERSUS GAUDET, at

414 U.S. 573. However, while the DOHSA allows such a suit to proceed in a federal forum, it also severely limits the measure of damages that may be recovered in such an action. See, MOBIL OIL CORP. V HIGGINBOTHAM, 436 U.S. 618. Accordingly, the plaintiff is strongly opposing the application of that statute to the case.

In an effort to persuade the Court not to impose the DOHSA, the plaintiff has argued that admiralty jurisdiction is not warranted in the present case and in order to apply the statute, the Court must exercise admiralty jurisdiction. FRIEDMAN VERSUS MITSUBISHI AIRCRAFT INTERNATIONAL, INC, 678 F. Supp 1064. So, plaintiff's argument concludes that the statute should not be applied.

Within her argument the plaintiff has gone to great lengths to persuade this

Court that in order to exercise admiralty jurisdiction, the Court must satisfy the Supreme Court's twofold admiralty jurisdiction test: One, that the alleged tort occurred on a navigable waterway; and two, that the wrong bears a significant relationship to a traditional maritime activity. See, EXECUTIVE JET AVIATION, INC. VERSUS CITY OF CLEVELAND, 409 U.S. 249.

However, upon a close reading of that case, it is clear to the Court that this two-pronged test only applies in the absence of a statute to the contrary, and the Supreme Court repeatedly and explicitly emphasized in that case that the Death on the High Seas Act was such a statute. Therefore, the requirement of a traditional marine nexus is not a prerequisite to the exercise of admiralty

jurisdiction pursuant to the Death on the High Seas Act. See, FRIEDMAN VERSUS MITSUBISHI AIRCRAFT INTERNATIONAL, INC., already cited, and KUNREUTHER VERSUS OUTBOARD MARINE CORP., 757 F. Supp 633. So, the Northern District of New York now joins the Eastern District of Pennsylvania in wrongly interpreting the EXECUTIVE JET case, and that might be true.

Accordingly, because it is not disputed by either party that the death occurred well beyond one marine league from the shore of any state, territory or dependency of the United States, this Court finds the negligence based on causes of action cited in the plaintiff's complaint are properly before the Court on admiralty jurisdiction and thus should be governed by general federal maritime laws, more specifically, the Death on the High

Seas Act.

Now, upon deciding the maritime law is the applicable law to the plaintiff's claims, the Court must now determine whether Costa Rica maritime law or United States maritime law applies. The factors for determining whether foreign or United States law applies are set forth by the Supreme Court in LAURITZEN VERSUS LARSEN, 345 U.S. 571, and HELLENIC LINES, LIMITED VERSUS RHODITIS, at 398 U.S. 306, REH DENIED 400 U.S. 856.

The Supreme Court found that eight factors determined the applicable law: One, the place of the wrongful act; two, the law of the flag; three, the domicile of the injured party; four, the allegiance of the defendant shipowner; five, the place of the contract; six, the inaccessibility of the foreign forum;

eight, shipowner's base of operations. That's LAURITZEN at 583 to 592.

Now, in the case at bar, while the accident occurred off the waters of the coast of Costa Rica, more factors relevant to this case point to the application of US law. These factors include: The decedent was a US citizen; all defendants except one are US citizens; and the contract was executed within the United States. Additionally, because the shipowner was not named a defendant in this case, the other factors cited by the Supreme Court are not relevant. Thus, using the federal choice of law rules articulated in LAURITZEN, the Court holds the maritime law of the United States will be applied and not the maritime laws of Costa Rica.

Now, as previously stated, this

action should be governed by federal maritime law, and more specifically, the Death on the High Seas Act. Additionally, I have already previously noted that the DOHSA limits what damages may be recovered by an aggrieved party. In the case at bar, it is clear if the DOHSA were applied to the plaintiff's action, the Court would be obligated to dismiss several counts of the plaintiff's complaint on the grounds that such recovery is prohibited by the statutory language of the Act.

However, prior to specifically addressing which of the specific claims the Court will be obligated to dismiss, this Court must take into account the fact that the plaintiff has cross-noticed pursuant to Rule 15(a) for leave to amend her complaint.

Rule 15(a) states that leave to amend

"shall be freely given when justice so requires." While it is within the discretion of this Court whether to grant or deny this motion, this discretion is limited to the mandate of the language of Rule 15(a). FOMAN VERSUS DAVIS, 371 U.S. 178. Unless there is a showing of bad faith or undue prejudice, leave to amend will be freely granted.

In the case at bar, there existed substantial confusion as to whether or not this suit warranted the application of the Act. Having so ruled that the DOHSA is applicable here and because there has been no showing by the defendant or any defendant that these claims have been brought in bad faith or that they will be unduly prejudiced, I feel that the plaintiff is entitled to additional time to amend her complaint to conform with

today's ruling and eliminate any invalid claims.

Accordingly, I am not going to address the defendants' motions for summary judgment because, in all likelihood, much of my analysis will be rendered moot by the plaintiff's amended complaint.

So, in conclusion, the Court is going to hold at this time that the circumstances present warrant the imposition of admiralty jurisdiction, and more specifically, the Death on the High Seas Act. In so holding, I am also going to grant the plaintiff's motion for leave to amend her complaint to conform to that holding. The plaintiff's amended complaint shall be filed with the Court within 30 days.

So, I'm going to deny defendants'

motions to dismiss but grant them leave to renew these motions after the plaintiff has submitted her amended complaint.

****

Order, Entered April 2, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

MARGARET MAYER, individually, and as executrix of the estate of JAMES E. MAYER, DECEASED,

Plaintiff,

-vs- 92-CV-220

CORNELL UNIVERSITY, INC., DAVID BLANTON, d/b/a VOYAGERS INTERNATIONAL, HORIZONTES NATURE ADVENTURES, KENNETH ROSENBERG, and LAURA BROWN.

Defendants.

Thomas J.McAvoy, C.J.U.S.D.C.

ORDER

Having heard oral argument from the parties and after considering the pleadings submitted to the court, it is hereby

ORDERED that the wrongful death claim of the plaintiff is governed by the DOHSA, 46 U.S.C. §761 et seq., and it is further

ORDERED that the remaining negligence based claims will be governed by general maritime law, and it is further

ORDERED that the maritime law of the United States, not the law of Costa Rica, applies to the case and, therefore, it is further

ORDERED that the Plaintiff's Cross-Motion pursuant to Fed.R.Civ.P. 15 is granted to the extent that plaintiff is granted leave to serve and file an amended

complaint consistent with the foregoing orders of the court within thirty (30) days of service of a copy of this order, and it is further

ORDERED that the motions of the defendants are denied without prejudice and with leave to renew said motions following service of the amended pleadings.

IT IS SO ORDERED

Dated at Binghamton, New York

April 2, 1994

Thomas J. McAvoy
C.J.U.S.D.C.

Proceedings of September 23, 1994

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

MARGARET MAYER,

Plaintiff,

-versus- 92-CV-220

CORNELL UNIVERSITY, ET AL,

Defendant.

****

THE COURT: Because plaintiff has failed to raise a material issue of fact as to her second, third and fourth causes of action, because defendants have established that they are entitled to judgment as a matter of law, summary judgment on the second and third cause of action of plaintiff's complaint is hereby granted to defendants Brown and Cornell University and summary judgment on the

fourth cause of action is hereby granted to Cornell University. Counts, two, three and four of the complaint are dismissed.

Now, plaintiff's first cause of action for wrongful death lies in negligence and is governed by DOHSA and general negligence principles under maritime law. Plaintiff's fifth cause of action is the decedent's survival claim for pain and suffering. In an admiralty court where the tortfeasor is neither owner or operator of the vessel implicated in the tort, the survival statute of the tortfeasor's state controls. See Montgomery versus Good Year Tire and Rubber Company, 231 Fed Supp 447; see also Canillas versus Joseph H. Carter, Inc., 280 Fed Supp 48. Since Section 11-3.2 of New York's Estate, Powers and Trusts Law provides for the survival claims for

conscious pain and suffering, this claim may go forward. The Court further finds that both the negligence claim and survival claim are properly pleaded under 12(b)(6) standards. The parties do not dispute that while maritime law applies to the negligence claim, the basic negligence analysis under that law comprehends the four familiar elements of duty, breach, causation and damages.

****

Plaintiff's sixth, seventh causes of action are dismissed for failure to state a claim. Summary judgment is granted for defendants on Plaintiff's second, third and fourth cause of action. Defendants' motion for summary judgment on plaintiff'f first and firth cause of action is denied.

****

Memorandum-Decision and Order,

Entered April 15, 1995

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

MARGARET MAYER, individually, and as Executrix of the Estate of JAMES E. MAYER, Deceased,

Plaintiff,

vs. 92-CV-220

CORNELL UNIVERSITY, INC., DAVID BLANTON, d/b/a VOYAGERS INTERNATIONAL, HORIZONTES NATURE ADVENTURES, KENNETH ROSENBERG and LAURA BROWN.

Defendants.

Thomas J.McAvoy, Chief U.S.D.J.

MEMORANDUM

DECISION AND ORDER

The question is presented as to whether plaintiff is entitled to a jury trial, at least as to his state survival action under § 11-3.2 of New York's Estate, Powers and Trusts Law, and, if so, whether both of plaintiff's claims should be given to that jury.

The Court first rejects defendant Cornell's arguments that the law of the case compels a bench trial or the conclusion that by realleging in her survival cause of action "each and every allegation set forth above" (Amended Cmplt. at ¶ 58), which necessarily realleged plaintiff's statement under Fed. R. Civ. P.9(h) (Amended Cmplt. at ¶ 2), that plaintiff somehow divested herself of

the diversity jurisdictional basis she had alleged (Amended Cmplt. at ¶ 1) or otherwise waived a jury trial. As this Court indicated at oral argument and in its order of February 27, 1995, the Court has never determined that a jury trial is unavailable in the instant action. Furthermore, nothing in the Court's statement that the remaining negligence causes of action would be governed by general federal maritime laws, more specifically, the Death on the High Seas Act (DOHSA), precludes affording plaintiff the jury trial she has requested.

As the Court decided on September 23, 1994, under DOHSA, where, as here, the tortfeasor is neither the owner nor operator of the vessel implicated in the tort, the survival statute of the tortfeasor's state controls. See

Montgomery v. Goodyear Tire & Rubber Co., 231 F.Supp 447, 452 (S.D.N.Y. 1964); See also Canillas v. Joseph H. Carter Inc., 280 F.Supp. 48, 51-52 (S.D.N.Y. 1968). It follows then, that as the Court decided on that date, DOHSA does not preclude plaintiff from asserting her state survival claim and that cause of action may go forward.

Furthermore, plaintiff has alleged an independent basis for jurisdiction, compare Complaint of Poling Transportation Corp., 776 F.Supp. 779, 784-85 (S.D.N.Y. 1991), and plaintiff's action presents a DOHSA maritime claim joined with a viable state statutory survival claim. When claims carrying the right to a jury trial are joined with admiralty claims those claims may be tried to a jury. See In re Korean Air Lines Disaster, 798 F.Supp. 755

(E.D.N.Y. 1992); In re Air Crash Disaster Near Honolulu, 783 F.Supp. 1261 (N.D.Cal. 1992); Friedman v. Mitsubishi Aircraft International, Inc., 678 F.Supp. 1064, 1065-66, nn. 3 & 5 (S.D.N.Y. 1988); Mynatt v. Heine, 1991 WL 45734 *3 (D.D.C. 1991); cf. In re Complaint of Berkley Curtis Bay Co., 569 F.Supp. 1491, 1494 (S.D.N.Y. 1983)("where the nonjury admiralty tradition and a plaintiff's jury right conflict, the jury right must prevail."); Favaloro v. S/S Golden Gate, 687 F.Supp. 475, 481 (N.D.Cal.1987)("Even though claims may sound in admiralty, where diversity jurisdiction can be established there is a right to a jury trial."). Review of the foregoing cases has persuaded the Court that plaintiff should be allowed to avail herself of her right to a jury in this action.

Defendant Cornell claims that the law in this Circuit is contrary to that conclusion and points to Preston v. Frantz, 1993 WL 499100 (2d Cir. 1993), Wahlstrom v. Kawasaki, 4 F.3d 1084 (2d Cir. 1993) and Deniston v. Boeing, 1991 WL 39194 (N.D.N.Y. 1991). Those cases are distinguishable, however, in that those plaintiffs claims joined their maritime wrongful death claims with judge-made general federal maritime survival actions. See Preston 11 F.3rd at 358 ("development of a *general maritime law survival action* necessarily precludes the application of state survival statutes.")(emphasis added); Wahlstrom, 4 F.3rd at 1091 (Neither DOHSA nor the Jones Act applicable, id. at 1091, and federal maritime law applies, id. at 1089); Deniston, 1991 WL 39194 at *8 ("The Court

concludes that *general maritime law* provides relief for pre-death pain and suffering")(emphasis added).

Finally, the Court has determined that given both plaintiff's claims arise from the same operative set of facts, and in light of the similarity of the issues to be considered in both causes of action, and weighing judicial economy as a factor, both plaintiff's state survival action and his DOHSA claim will be submitted to the jury. See Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); In re Korean Air Lines, 798 F.Supp. at 755 (E.D.N.Y.1992).

IT IS SO ORDERED

April 15, 1995
Binghamton, New York

Thomas J. McAvoy
Chief U.S.
District Judge

Memorandum-Decision and Order,
Entered December 5, 1996

Margaret MAYER, individually, and as Executrix of the Estate of James E. Mayer, Deceased, Plaintiff,

v.

CORNELL UNIVERSITY, INC., David Blanton, d/b/aVoyagers International, Horizontes Nature Adventures, Kenneth Rosenberg, and Laura Brown, Defendants.

No. 92-CV-220.

United States District Court
N.D. New York

December 5, 1996

MEMORANDUM-DECISION AND ORDER

McCurn, Senior District Judge.

On December 4, 1995, the court heard oral argument with respect to the November 28, 1995, letter of defendants Cornell University and Laura Brown (collectively referred to throughout as "Cornell"), requesting this court to revisit the issue of whether plaintiff Mayer is entitled to a jury trial. After oral argument the court gave some but not all of its reasons for concluding that plaintiff Mayer is not entitled to a jury trial on her remaining causes of action. At oral argument, the court mentioned that it would be issued a memorandum decision and order fully setting forth its analysis of the jury trial issue, and following constitutes the court's decision in this regard.

BACKGROUND

As the parties are well aware, whether plaintiff Mayer is entitled to a jury trial has been the subject, both directly and indirectly, of several prior motions in this case. Because Judge McAvoy's prior decisions in that regard are a part of the record, the court sees no need to repeat the entire history of this issue at this point. Suffice it to say that Judge McAvoy, to who this case was originally assigned, most recently held that "both plaintiff's state survival action and his DOHSA claim will be submitted to the jury." Memorandum Decision & Order ("MDO") (N.D.N.. April 15, 1995)(McAvoy, C.J.) at 4, Docket Entry #162. Defendant Cornell did not move for reconsideration of that order within ten days after its entry, as it had a right to

do under Local Rule 7.19(g). Instead, with the permission of this court on November 29, 1995, Cornell submitted a letter via FAX wherein it seeks to have this court revisit the issue of whether plaintiff is entitled to a jury trial on her remaining two causes of action. A copy of this letter motion was also FAXed to plaintiff on November 29, 1995. The next day, on November 30, 1995, the court advised plaintiff's counsel and Cornell's counsel, be telephone that it would hear Cornell's motion for reconsideration on Monday, December 4, 1995, at 10:00 a.m. The court also gave plaintiff permission to respond in writing to this motion, and that was done.

Basically it is Cornell's position that plaintiff is not entitled to a jury trial in this action because her only two

remaining causes of action sound in admiralty, and traditionally there is no right to a jury trial because, among other reasons which will be more thoroughly addressed herein, that is the law of the case; and in fact, after Judge McAvoy's April 15, 1995, MDO, in a revised pre-trial stipulation filed with this court on May 1, 1995, the parties agreed "[t]hat the law of the case is that the basis of federal jurisdiction...is diversity (28 U.S.C. Section 1332) as to the survival action under Section 11-3.2 of the New York Estates Powers and Trusts Law..." Revised Pre-Trial Stipulation at 1, 1 (citations omitted), Docket Entry #168.

DISCUSSION

[1] Before addressing the merits of the jury trial issue, the court must consider the timeliness of this motion;

that is whether at this late date the court should entertain what it deems to be a reconsideration motion by Cornell. Clearly it would have been preferable for Cornell to have timely moved for reconsideration as Local Rule 7.1(g) allows. (As an aside, the court notes that Fed.R.Civ.P. 60(b), which allows, in some instances, for reconsideration of final judgment, does not come into play here because the disputed jury trial order is non-final.) The court has determined, however, that under all of the circumstances, it will exercise its plenary power to reconsider Judge McAvoy's nonfinal order as to the propriety of a jury trial in this case. See Lewis v. Grinker, 600 F. Supp. 169, 170 n.1 (E.D.N.Y. 1987) (citation omitted) ("Since no final judgment has been entered in this

case, the decision whether or not to reconsider a non-final order is within the plenary power of this Court."). This is fully consistent with the "`[w]ell-established [rule] that the interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment[.]'" Conrad v. Beck-Turek, Ltd., Inc., 891 F.Supp. 962, 967 (S.D.N.Y. 1995)(quoting In re United States, 733 F.2d 10, 13 (2nd Cir. 1984))(emphasis added).

[2] The next issue is whether, as plaintiff contends, the law of the case doctrine bars reconsideration by this court of Judge McAvoy's April 15, 1995, MDO. As the Second Circuit recently stated, "Under the doctrine of law of the case, `a legal decision made at one stage

of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.'" North River Ins. Co. v. Phila Reinsurance Corp. 63 F.3d 160, 164 (2nd Cir. 1995)(quoting Williamsburg Wax Museum, Inc. v. Historic Figures, Inc. 810 F.2d 243, 250 (D.C.Cir. 1987)). This doctrine has its conceptual underpinnings in "the jurisprudential desire to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit." Scottish Air. Intern. v. British Caledonian Group, 152 F.R.D. 18, 24 (S.D.N.Y. 1993)(citations omitted); see also Dictograph Products Co. v. Somotone Corp., 230 F.2d 131, 135 (2nd

Cir. 1956)(L.Hand, J.) ("[T]here is no imperative duty to follow that earlier ruling - only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs.").

However the "[l]aw of the case is not a commandment etched in stone." Childress v. Taylor, 798 F.Supp. 981, 993 (S.D.N.Y.1992); see also Conrad, supra, 891 F.Supp. at 967 (internal quotations and citations omitted) ("The doctrine is not an inviolate rule of law but merely expresses the general practice of refusing to reopen what has been decided"). It is a discretionary doctrine "and`does not constitute a limitation on the court's power.'" Id. (quoting United States v. Birney, 686 F.2d 102, 107 (2nd Cir. 1982)); see also DiLara v. Power Authority

of State of New York, 982, F.2d 73, 76 (2d Cir.1992)(same). Thus, when a court is asked to reconsider its own prior rulings, under the "more flexible branch" of the law of the case doctrine, it may do so "when those previous decisions were substantially erroneous or when reconsideration is necessary to avoid injustice." Scottish Air, 152 F.R.D. at 25 (internal quotations and citations omitted). "Generally, however, the law of the case counsels against reconsideration absent compelling circumstances, including an intervening change of law, the availability of new evidence, or to correct a clear error or prevent manifest injustice." Id. (internal quotations and citations omitted). Consequently, although "[a] court should be loathe to revisit an earlier decision[,]" North

River 63 F.3d at 165 (internal quotations and citations omitted), and although it should exercise its underlying power to reconsider earlier rulings "sparingly," Id. (internal quotations and citations omitted), as the foregoing demonstrates, there are certain circumstances where reconsideration is appropriate.

[3] What is more, the fact that the present case has been reassigned to this court does not preclude reconsideration by this court because non-final district court orders and rulings "`may be modified to the same extent if the case is reassigned to another judge.'" Conrad, supra, 891 F.Supp. at 967 (quoting In re United States, 733 F.2d at 13 (emphasis added)). That is so because "`[j]udges of coordinate jurisdiction are not bound by each others rulings, but are free to

disregard them if they so choose.'" Id. (quoting Birney, supra, 686 F.2d at 107). "The only limitation upon that general rule is that `prejudice does not ensue to the party seeking the benefit of the doctrine...In this context, prejudice does not mean the harm which results from a failure to apply the doctrine; rather, it refers to a lack of sufficiency of notice and an opportunity to prepare armed with the knowledge that one judge is disregarding the ruling of another.'" Id. at 967-968 (quoting Birney, 686 F.2d at 107).

[4] There is no prejudice to the plaintiff in this case because she was given adequate notice and opportunity to respond to this motion, both orally and in writing. Furthermore, because as previously mentioned the parties have been

sparring over this jury trial issue off and on throughout this litigation, plaintiff has created an ample record as to her legal position on this issue, and this court is fully apprised of her position from her prior and recent submission, as well from oral argument. Lastly, reconsideration of the jury trial issue will save the court and the parties the time and expense of relitigating this action before the court if it is later determined that plaintiff was not entitled to a jury. See Conrad, supra, 891 F.Supp. at 968 ("Reconsideration of the issues raised by Skinner's Bar will save the Court and the parties the time and expense of litigating purely legal claims that, even in the event of trial, could not be submitted to a jury.").

Having determined that this court may

reconsider the non-final order of the transferor court that plaintiff is entitled to a jury trial, the court is now free to consider whether, as Cornell suggests, that determination constitutes a clear error of law and/or creates manifest injustice which would justify departure from the law of the case doctrine.

[5] As mentioned earlier, in his most recent decision addressing the jury trial issue, Judge McAvoy held that plaintiff's remaining two causes of action are both properly submitted to a jury. Judge McAvoy offered several reasons for that conclusion. first, he pointed out that in a previous ruling he had held "under DOHSA, where, as here, the tortfeasor is neither the owner nor operator of the vessel implicated in the tort, the survival statute of the

tortfeasor's state controls." MDO at 2 (citations omitted). From there, Judge McAvoy extrapolated that "DOHSA does not preclude plaintiff from asserting her state survival claim..." Id. Judge McAvoy also explained that because, in his view, plaintiff presented a DOHSA claim "joined with a viable state statutory survival claim," plaintiff was entitled to rely upon a line of cases which support the proposition that "[w]hen the claims carrying the right to a jury trial are joined with admiralty claims those claims may be tried to a jury." Id. at 2-3 (citations omitted)(emphasis added). Third Judge McAvoy distinguished three cases from this Circuit, upon which Cornell relied and continues to rely: Preston v. Frantz, 11 F.3d 357 (2nd Cir. 1993), cert. dismissed, ___U.S.___, 115

S.Ct. 31, 129 L.Ed.2d 928(1994); Wahlstrom v. Kawasaki, 4 F.3d 1084 (2nd Cir. 1993) cert. denied, __U.S.__, 114 S.Ct. 1060 127 L.Ed.2d 380 (1994); and Deniston v. Boeing 87-CV-1205, 1991 WL 39194, 1991 U.S.Dist. LEXIS 3440 (N.D.N.Y. March 22, 1991). According to Judge McAvoy, those three cases are distinguishable because those plaintiffs "joined their maritime wrongful death claims with judge-made general federal maritime survival actions." Id. at 3 (citations omitted)(emphasis added). Finally, Judge McAvoy cited reasons of judicial economy, and the fact that both causes of action arise out of the same set of operative facts, as justification for proceeding with this case as a jury trial. See Id. at 4.

After carefully considering that decision by Judge McAvoy, as well as the

parties' respective arguments, the court is forced to conclude that this is one of those rare instances when it cannot, and indeed should not, adhere to the law of the case as established by the preceding judge. This court has a fundamental disagreement with Judge McAvoy as to the nature of plaintiff's fifth cause of action, wherein she seeks to recover under "General Maritime Law" essentially for decedent's pain and suffering from the time of the accident until he died. See Amended Complaint at 18 Paragraphs 59 and 60. Even though there is no mention in that cause of action of a state survival claim, Judge McAvoy started from the assumption that that cause of action is based upon state law. As will be more fully explained in a moment, however, the Second Circuit has explicitly held that

"the development of a general maritime law survival action necessarily precludes the application of state survival statutes." Preston, 11 F.3d at 35. Thus, in this court's opinion, after Preston, plaintiff Mayer is not free to assert a claim in this case based upon a state survival statute such as section 11-3.2 of the New York Estates Powers and Trusts Law. Any survival claim she may wish to pursue must be based upon general maritime survival law.

This distinction between the way Judge McAvoy characterizes plaintiff's fifth cause of action and the way this court characterizes such cause of action explains why this court has reached a different conclusion than did Judge McAvoy. Judge McAvoy believes that plaintiff's fifth cause of action is based

upon state survival law, which would enable plaintiff to obtain a jury trial. In this court's opinion, however, Preston forecloses the availability of a state law survival action because of the development of a general maritime law survival action. Indeed, the Second Circuit expressly said as much when it explained in Preston, "as the expansion of general maritime law remedies for wrongful death...has circumscribed the application of state wrongful death statutes in admiralty, ..., so the development of a general maritime law survival action necessarily precludes the application of state survival statutes." 11 F.3d at 358 (citations omitted). Further, the court soundly reasoned, "Without such preclusive effect, "the tensions and discrepancies" resulting form application of state remedial

statutes could not be removed.'" Id. (quoting Wahlstrom, 4 F.3d at 1089)(quoting in turn Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401, 909 S.Ct. 1772, 1788,26 L.Ed.2d 339 (1970)). Consequently, the Second Circuit in Preston explicitly rejected the plaintiffs' argument "that state law survival claims traditionally are permitted in federal admiralty actions[.]" Id. (citations omitted).

Plaintiff Mayer attempts to limit the application of Preston to its facts by pointing out that the plaintiffs there sought recovery under Connecticut's survival statute which, unlike the general maritime survival action, allows for recovery of lost future earnings. Plaintiff further notes that, in contrast, New York's survival statute, upon which

she relies, does not allow for recovery of lost future earnings, and thus is not preempted by general maritime survival law. Given the Preston court's broad language though, this court does not believe that factual distinction renders Preston inapplicable here. There is nothing in Preston suggesting that the court intended to limit its holding therein to situations where the remedies available under a state survival statute are at odds with those available under a general maritime law survival action. Thus, given the Preston court's unequivocal language, in this court's opinion, as already noted, the only possible basis for plaintiff's fifth cause of action is an action premised upon federal general maritime survival law. Consequently, plaintiff's only two

remaining causes of action - one based upon DOHSA and the other based upon general maritime survival law- are both based in admiralty law. Plaintiff Mayer is not entitled to a jury trial, therefore, because jury trial are not available in admiralty actions. See, e.g. Complaint of Great Lakes Dredge and Dock Co., 895 F.Supp. 923, 930 (D.R.I. 1992)(citation omitted) ("Admiralty claims, including those for conscious pain and suffering, and DOHSA claims are generally tried by the Court sitting without a jury.")

Furthermore, the court agrees with Cornell that the cases cited by Judge McAvoy for the proposition that when admiralty claims are joined with claims which carry the right to a jury, the right to a jury prevails, are not dispositive

here. That is so because although he correctly stated the general rule of law in that regard, Judge McAvoy failed to take into account a critical distinction between those cases and the present one: in each of those cases the plaintiff had at least one cause of action, separate and apart from admiralty, which gave them an independent jurisdictional basis, along with the right to a jury trial. For example in In re Korean Air Lines Disaster of Sept. 1, 1983, 798 F.Supp. 755 (E.D.N.Y. 1992), the court had concurrent jurisdiction; there was federal question jurisdiction based upon the Warsaw Convention, which entitled plaintiff to a jury trial, as well as admiralty jurisdiction based upon DOHSA. Likewise, the plaintiff in In re Air Crash Disaster Near Honolulu, Hawaii, 783 F.Supp. 1261

(N.D. Cal. 1992), were entitled to a jury trial because they all asserted viable claims under the Warsaw Convention. Id. at 1266. They did not invoke the court's admiralty jurisdiction. By contrast, as previously explained, the only remaining cause of action in this case are both admiralty based.

Because under Preston plaintiff Mayer cannot maintain a state survival cause of action, it stands to reason that she is not entitled to invoke the court's diversity jurisdiction so as to gain the right to a jury trial in this DOHSA based admiralty action. See Thornhill v. Otto Candies, Inc., 94-1478, 1994 Wl 532591 at *4, 1994 U.S. Dist. LEXIS 13861, at *15 (E.D.La. Sept. 27, 1994) (plaintiffs not entitled to jury trial for DOHSA claims and general maritime law survival

actions).

[6] The court is well aware of the parties' revised pre-trial stipulation mentioned earlier. It is plaintiff's position that that stipulation standing along is dispositive of the current reconsideration motion on the jury trial issue. The court disagrees. The court has an independent obligation to examine the basis for its jurisdiction, see Lebron v. National Railroad Passenger Corp., 69 F.3d 650, 659 (2nd Cir. 1995), and may do so at any point in the litigation. Therefore, the parties are not free to stipulate (if, indeed, that is what they stipulated to here) to a jurisdictional basis which is not available in law. Accordingly, the court does not find that the parties' revised pre-trial stipulation requires this court to ignore its

obligation to independently ascertain the jurisdictional basis for plaintiff's remaining causes of action.

For all of the foregoing reasons, the court is persuaded that given the basis for plaintiff's remaining two causes of action, to allow Judge McAvoy's April 15, 1995, MDO to stand would result in clear error and/or manifest injustice. In particular, as the previously discussed case law makes clear, at least in this Circuit, the only possible basis for plaintiff's fifth cause of action is as a general maritime survival law claim. And because such claim is grounded in admiralty, clearly plaintiff is not entitled to a jury trial with respect thereto.

[7] Before concluding, the court notes that it is fully cognizant of case

authority supporting the proposition that DOHSA does not preempt state survival claims and hence such claims may be tried to a jury. See, e.g., Palischak v. Allied Signal Aerospace Co. 893 F.Supp. 341, 348-351 (D.N.J.1995); and Mynatt v. Heine, 89-0748, 1991 WL 45734, at *4 (D.D.C. March 21, 1991). However, even if that was the law in this Circuit at one time, it is not now. The Second Circuit in Preston unequivocally held that the availability of a general maritime law survival action precludes a state law survival action. Obviously, as a district court sitting within the Second Circuit, this Court is bound to follow Preston with all of its ramifications; and it is free to disregard authority to the contrary outside this Circuit. Moreover, as the court pointed out in Palischak, where, interestingly, it

opined that "the better view is that survival action arises from general maritime law," as opposed to arising under general maritime law, "the entire case could be heard by a judge sitting without a jury." 893 F.Supp. at 351 n.11 (and discussion therein at 348-349). Thus, for all of these reasons, the court holds that this case will proceed to trial on Wednesday, December 6, 1995, at 10:00 a.m. without a jury.

IT IS SO ORDERED.

Memorandum-Decision and Order

Entered April 15, 1996

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

MARGARET MAYER, Individually, and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased,

Plaintiff,

v.

CORNELL UNIVERSITY, INC., and LAURA BROWN,

Defendants.

NEAL P. McCURN, S.J.

MEMORANDUM-DECISION AND ORDER

Introduction

Familiarity with the protracted history of this litigation is assumed. Tragically, on March 14, 1990, James E. Mayer died while snorkeling in Costa Rica. The accident occurred off the Osa Peninsula while the Mayers were en route to the Isla del Cano on a boat owned and operated by Marenco Biological Station ("Marenco").[4] At the time, Mr. Mayer and his wife, Margaret Mayer, were on a group tour of Costa Rica under the auspices of the Cornell University Laboratory of Ornithology ("the Lab"). Although the Lab

[4] Marenco is a private nature reserve, located in the rain forests of the Osa Peninsula. Pl. exh. 4 and 10.

sponsored the tour,[5] Agreement (Aug. 14, 1994), Docket #96. Thus, Cornell University,[6] along with Ms. Brown, are the only remaining defendants in this action.

In December, 1995, this court conducted a non-jury trial as to plaintiff Mayer's only two remaining causes of action: (1) a wrongful death cause of

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[5] Chief Judge McAvoy previously held in this case that "[C]ornell's relationship to the Costa Rica trip is most accurately characterized as one of sponsorship[,]" and the parties have not asserted otherwise. See Transcript of McAvoy Decision (Sept. 23, 1994)("McAvoy Dec.") at 12 (citing Vogel v. West Mountain Corp., 97 A.D.2d 46, 470 N.Y.S. 2d 475 (3rd Dep't 1983)). Indeed, the Lab's Executive Director at the time also described this trip as Laboratory sponsored. Pl. exh. 86.

[6] The Lab, which is a part of Cornell University, was not named as a separate defendant in this lawsuit. Therefore, depending upon the context, Cornell and the Lab are used interchangeably throughout.

action governed by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 et seq. (West 1975 and West Supp. 1995); and (2) a survival claim pursuant to general maritime law. Following the trial, the court ordered the parties to submit post-trial memoranda "limited...to the issue of whether defendants Cornell University and/or Laura Brown owed any legal duty to plaintiff and/or her decedent." Excerpt Trial Transcript (Dec. 18, 1995)("Trial Tr."), Docket #203, at 2. Relying upon an earlier decision of Chief Judge McAvoy,[7] more specifically, the court directed the parties to "discuss their respective views as to 'whether Cornell could have exercised any control over the Costa Rica

[7] Due to Chief Judge McAvoy's other trial commitments, and to prevent any further delay, this court agreed to conduct this trial.

trip's content or through its representative, Ms. Brown, stood in a position to control or alter the events which lead to the fatality in question." Id. (quoting McAvoy Dec. at 14-15). The parties were also directed to address another possible basis for the imposition of a duty on Cornell and that is the issue of "whether, given the proof adduced at trial, 'Cornell had a sufficient quantum of knowledge of unsafe conditions,' such as would 'trigger a duty to investigate and a duty to exert control over the trip itinerary and the incidents on behalf of these plaintiffs." Id. at 2-3 (quoting McAvoy Dec. at 16). As a corollary of that issue, the parties were also directed to address "whether `Cornell had some duty to act on that knowledge"." Id. at 3 (quoting McAvoy Dec. at 17).

Turning next to Ms. Brown, the Court directed the parties to "confine their post-trial memoranda to the issue as previously defined by Judge McAvoy as to whether or not she `expressly undertook [duties] either directly by her interactions with plaintiff and decedent or through her position with Cornell." Id. at 3 (quoting McAvoy Dec. at 19). Finally, at plaintiff's prompting the court granted the parties leave to "address the issue of the disclaimer or the effect of the disclaimer on [Ms. Brown's] conduct." Id. at 5. The parties have now fully complied with that order. Thus in accordance with Fed. R. Civ. P. 52, the court issues the following findings of fact[8] and conclusions of law.

[8] The proof at trial was extensive. Given the narrow legal issues presented as to duty, however, the findings of fact

FINDINGS OF FACT[9]

I. Pre-Tour Preparation

A. The Mayers

Prior to the Mayers' trip to Costa Rica, Mr. Mayer had been interested in birding for some time, even taking a Lab home study course in 1982. Through a brochure they received in the fall of 1989, which summarized the Lab's schedule of 1989-90 tours, the Mayers first became aware of this Costa Rica tour. Pl. exh. 3. As instructed on that tour schedule, in October, 1989, Mr. Mayer contacted Nora Ettinger, the Lab's tour coordinator, requesting more information about this

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herein are necessarily confined to those which the court deems relevant to the resolution of such issues.

[9] For the most part, the trial evidence was not in conflict. But, as will be seen, the parties offer widely differing interpretations of a some critical facts.

Costa Rica trip.[10] Around that same time, the Mayers received several other brochures about the upcoming Costa Rica tour. See, e.g., Pl. exh. 4,6 and 8-13. Besides these brochures, the mayers received the lab's quarterly magazine where, in one issue, this Costa Rica tour is briefly mentioned, although nothing is said about snorkeling. Pl. exh. 76. The other issue urged Lab members to "[m]ake the best use of [their field guides...[by][j]oin[ing] a Lab-sponsored tour for fun-filled birding adventure[,]" but it did not mention any specific tour destination, let alone snorkeling. Pl. exh. 77. With the exception of these Lab magazines, Mrs. Mayer was unable to

[10] Mrs. Mayer testified that at no time in preparing for this trip did she herself have any conversations with anyone at the Lab.

definitely identify the source of other written materials. She did not know whether those brochures had been mailed and/or prepared by Voyagers, by the Lab, or perhaps by Marenco and/or Horizontes.

After discussing the possibility of taking this Costa Rica trip between themselves, and after reviewing these brochures and advertisements, the Mayers decided to go ahead with the trip, including the five day extension to Marenco. The Voyagers brochures included that option, but it was not mentioned in the Lab's tour schedule. Compare Pl. exh. 3 with Pl. exh. 4 and 6.

By check dated October 20, 1989, and payable to Voyagers, Mr. Mayer made a $800.00 deposit on the Costa Rica trip. Pl. exh. 7. That same date, the Mayers executed a Voyagers Reservation Form. Pl.

exh. 19. And although the sentence just preceding her signature states, "I (We) have read and accept the conditions and responsibilities paragraphs[,]" Mrs. Mayer forthrightly testified that she did not read the fine print on the back of that form where those paragraphs are located. Found on the back of that reservation for is, among other things, the following disclaimer:

> VOYAGERS INTERNATIONAL of Ithaca, NY, and its agents act only as agents for the various companies whose facilities are made available through this program. VOYAGERS assumes no responsibility or liability in connection with the service of any aircraft, vessel, carriage, or other conveyance that is used

> wholly or in part in the performance of their duty to the passengers; neither will they be responsible for any act, error, or omission, or for any injury, loss, accident, delay, or irregularity that may be occasioned by reason of any defect in any vehicle or for any reason whatsoever, or through the neglect or default of any company or person engaged in carrying out the purposes for which coupons or tickets have been issued.

Id. (emphasis in original). The last sentence of the Conditions and Responsibilities portion of the reservation form expressly states, in bold print, "The above conditions and

responsibilities also apply in full to Ken Rosenberg, the Cornell Laboratory of Ornithology and to its representatives." Id. (emphasis added).

In accordance with the directions on the reservation form, the Mayers returned their deposit check and that form to Voyagers. Closer to the time of the trip, Mr. Mayer paid to Voyagers an additional $5,380.00 - the balance due for the Costa Rica trip. Pl. exh. 14. Shortly before the trip, the Mayers received a "final packet" from "Managing Director," David Blanton. Pl. exh. 28. At the time Mrs. Mayer was not aware who Mr. Blanton was or of his affiliation with Voyagers. Thus in making the arrangements for this trip, the proof at trial revealed that the Mayers had some contacts with both the Lab and with Voyagers, although at the time they

did not distinguish between the two entities.

B. The Lab/Mrs. Brown

There are several noteworthy aspects of the Lab's preparation for the March, 1990, Costa Rica tour. The first pertains to lab generated written materials, which admittedly were few. Other than the previously mentioned announcements in the Lab's quarterly magazine,[11] the only written material about the Costa Rica trip which the Mayers received, and for which the Lab was responsible, was the 1989-90 tour schedule, including a description of the Costa Rica tour. Nora Ettinger had overall responsibility for the publication and dissemination of that schedule. Deposition of Nora Ettinger (July 21, 1993) at 4 and 9. Generally, when she

[11] Pl. exh. 76 and 77.

received inquiries as to tours listed in that schedule, in keeping with her role as liaison between the Lab and the tour operator, she would she would call the tour operator and give the name and address of the person who had made the inquiry so that the tour operator could follow up on that inquiry. Id. at 11 and 45-48; Deposition of Scott Sutcliffe (July 9, 1993) at 59 and 62. Although the Lab took responsibility for preparing these annual tour schedules, after the tour, tour operators such as Voyagers reimbursed the Lab for the expense of producing and mailing the schedules. Id. at 10; Trial Testimony Scott Sutcliffe (December 18, 1995).

Insofar as the 1989-90 tour schedule was concerned, the Lab retained a freelance writer to draft the copy for

that brochure. Id. at 20-21. During the process, Ms. Ettinger read the copy in the galley stage, including the fact that Ken Rosenberg and Laura Brown were jointly listed as "leaders" of the Costa Rica tour, and that further along in the description of that tour, Rosenberg was again identified as a "tour leader," whereas Ms. Brown was described as a "tour assistant." Id. at 26-27; see also Pl. exh. 3.

Ms. Ettinger convincingly explained that the reason Ms. Brown was variously described as a tour leader and as a tour assistant in that schedule is that the editors like to use different words and in her view, they used tour assistant, tour leader, and Lab representative synonymously. Id. at 62-63. In other words, the editors want to vary the copy

by not continually using the same descriptive word or phrase. Ms. Ettinger added that when she spoke to the Lab publications department about the use of the word "leader" to describe Ms. Brown's role on this tour, she was deemed "too picky." Id. at 63-64.

In addition to preparing the annual tour schedule, there was some discussion between David Blanton and the Lab regarding who would serve as the Voyagers tour leader. In responding to a request by Ms. Ettinger, in a letter dated November 28, 1988, Mr. Blanton proposed several trip ideas for 1990, including to Costa Rica. Pl. exh. 20. In his brief summary of the Costa Rica tour, Mr. Blanton suggested Raphael Campos as the tour leader, noting his specialization in ornithology, his fluency in both English

and Spanish, his prior successful tour leadership experiences, and the fact that he is Costa Rican. Id. Slightly more than a week later, on December 6, 1988, Mr. Blanton again wrote Ms. Ettinger with trip proposals for 1990. Again, Costa Rica was among the proposed destinations, but this time Ken Rosenberg was designated as leader. Def. exh. 32.

When questioned as to the circumstances surrounding the change in tour leaders, at first Ms. Ettinger responded that she "ha[d] no idea" how that change had come about. Ettinger Dep. at 31. After further questioning, she testified that at the behest of someone in administration, she probably spoke to Blanton and asked him to send more information about Mr. Campos because he was not someone known to the Lab as a tour

leader. Id. 31-32. By the same token, however, she does not believe that anyone in the administration spoke to her about either suggesting, asking or recommending Ken Rosenberg as tour leader. Id. at 322. Scott Sutcliffe, the Lab's Director of Public Affairs at the time, went even further, testifying that Mr. Blanton selected Rosenberg to be the tour leader. Sutcliffe Dep. at 25. Sutcliffe was not questioned as to the basis of his knowledge, however; and thus the court does not give much credence to his testimony on this point, particularly given that Sutcliffe's testimony is not corroborated by any of the other witnesses with knowledge on this point.

In contrast to Ms. Ettinger, Mr. Blanton seemed to vividly recall the fact that there was a discussion between he and

the Lab regarding selection of the tour leader, although he was less clear on the specifics of that discussion. Consistent with Ms. Ettinger's testimony, Blanton too recalled that she expressed some concern because Mr. Campos was unknown to the Lab. Deposition of David Blanton (Nov. 24, 1992) ("Blanton Dep.") at 103-108. And although Mr. Blanton does not recall whether it was he who first suggested Rosenberg as alternative tour leader, or whether someone at the Lab did, he did testify that during this conversation both he and the Lab agreed upon Rosenberg as the tour leader. Id. at 103-106. Importantly with the exception of this discussion as to whether Campos or Rosenberg would serve as tour leader, Mr. Blanton confirmed that the Lab made no other suggestions as to the operation of

the tour. Id. at 111.

As agreement between the Lab and Voyagers as tour operator for all of the 1990 Lab-sponsored tours, including Costa Rica, was memorialized in January 21, 1989, letter from Sutcliffe to Blanton, which Blanton signed on February 3, 1899. Pl. exh. 31. That agreement provided, among other things, that Voyagers would pay the Lab "10 percent (up to a maximum of $300/person) of the total advertised price for each participant." Id. That agreement also provided: "Voyagers will allow one Lab staff person or other appropriate representative to join each trip at no cost to the Lab. We expect that person to assist the tour leader in ways that will be helpful in making a

better trip." Id. (emphasis added).[12] No one disputes this fee arrangement or the facet that the Lab eventually received such a fee. See Deposition of David Blanton (Aug. 30, 1993)("Blanton Dep. III") at 63-64. This is the only written document containing the terms and conditions of the relationship between Cornell and Voyagers. Blanton Dep.I at 118.

Naturally, Ms. Brown was not heavily involved in pre-tour preparations. As she

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[12] In his deposition, Blanton was always careful to refer to Ms. Brown as a co-leader, along with Mr. Rosenberg, and, even when not referring to her as such, at ever opportunity, he was quick to strongly imply that that was her role. Yet, long before this litigation, and before it was to his arguably to his advantage to do so, by executing this agreement, Blanton acquiesced in having the Lab representative's role be defined solely in terms of "assist[ing] the tour[.]" See Pl. exh. 31.

candidly describes it, she was able to go on the trip as a "perk" of her job. Brown Test. at 5. When possible, the Lab's "standard practice" is to send a representative, such as Ms. Brown, on these Lab-sponsored tours, but the representative is not paid. Sutcliffe Dep. at 17. Voyagers also did not pay Ms. Brown or cover any of her expenses. Blanton Dep. III at 74-75. Instead, with her supervisor's permission, Ms. Brown was required to use already accrued vacation time, and she may have had to take some days without pay. Brown Test. at 5; and Deposition of Laura Brown (July 9, 1993) at 39. Insofar as planning the itinerary is concerned, Ms. Brown had no part in that aspect of the tour. Brown Dep. at 10.

As the designated Lab representative,

Ms. Brown received the standard guidelines for that position. Id. at 23; Brown Dep. at 29-30; see also Def. exh. 23. Those guidelines detailed the Lab representative's duties before, during and after the tour. Before the tour, as Lab representative Ms. Brown was instructed, inter alia, to acquaint herself "with the tour itinerary, geography of the tour area, and birds likely to be encountered." Def. exh. 23 at 1. The guidelines further stated that before the trip the "tour company" (Voyagers) would provide "special information about the tour and a list of participants[]" for the Lab representative's review. Id. During the tour the Lab representative was instructed, naturally, to "[p]rovide guidance...in sighting birds, identifying birds, and maintaining species lists[,]"

and to generally share that "birding expertise with tour participants." Id. In terms of interaction with the tour participants, the Lab representative was to assist them with transportation, checking in and out of hotels, and she was to "[a}rrange for people to eat together." Id. The Lab representative's duties vis-a-vis the tour participants is probably best described the guidelines' direction, "Engender a cooperative relationship between participants[,]" which includes making sure that all participants "have an equal opportunity to interact with the tour leader [Rosenberg]." Id. As indicated by Ms. Brown's handwritten notations on the guidelines, and amply supported by other evidence adduced at trial, she conscientiously carried out her duties as set forth therein. These

guidelines were her only instructions; she did not receive a "Leader's Manual." Brown Dep. at 14.

C. Voyagers/Mr. Rosenberg

As can be gleaned from the foregoing, Voyagers was extensively involved in pre-tour preparations. Besides proposing Costa Rica as a possible tour destination, Voyagers joined in the decision to select Mr. Rosenberg as Voyagers tour leader. Rosenberg was someone who was quite familiar to Voyagers in that he had previously worked as a tour leader on other Voyagers tours. Voyagers, as opposed to the Lab, paid Rosenberg to lead this tour. Blanton Dep.II at 21 and 74; see also Pl. exh. 81. What is more, Rosenberg and Blanton formulated the itinerary on their own. Blanton Dep. I. at 19 and 135-36; Pl. exh. 25; and Def.

exh. 11. Mr. Blanton was sure of himself on this point because in 1987 he had asked Rosenberg to formulate the original Costa Rica itinerary based upon Rosenberg's prior experiences in Costa Rica. Id. at 135-37. The same basic itinerary was followed on subsequent Lab/Voyagers Costa Rica trips, including this one. Id. at 138-39.

In addition to devising this itinerary, as already alluded to, Voyagers also provided tour participants, as well as Ms. Brown, with several brochures about their upcoming trip to Costa Rica. One such brochure detailed the itinerary, as well as providing some general information about Costa Rica and the trip. See Pl. exh. 4. The other quite extensive Voyagers brochure, for which Voyagers has a copyright, is entitled "Costa Rica

Travel Trips and Information." Pl. exh. 6. Finally, it appears that Voyagers made arrangements to obtain airline tickets and then sent those tickets on to the tour participants, along with "a carry on travel bag, luggage tags, and last minute information and instructions." See Pl. exh. 27. Thus, as the foregoing demonstrates, Voyagers was responsible for nearly every aspect of this Costa Rica trip, except the initial promotional materials.

II. Events of March 13, 1990

Those who testified as to how it came to be that the group decided to take the Isla del Cano excursion basically gave the same account. First of all, no one disputes that although Marenco was included on the original itinerary as a tour option, the separate day excursion to

the Isla del Cano was not. It is also undisputed that the possibility of taking that excursion did not arise until March 13, 1990. At that time, Mr. Rosenberg was approached by Nicholas Clark, a naturalist employed by Marenco, who had been assigned to the Lab group. Id. at 21. Clark mentioned that the next day a Marenco boat would be going out snorkeling and that even though it was not listed as part of the Lab group's itinerary, members of that group could go because there was space available. Id. Rosenberg responded "[t]hat [he] would consult with [his] co-leader and ask the group if they wanted to go." Id. Sometime later Rosenberg told Ms. Brown about Clark's offer, but evidently she was not present when that offer was originally made. Brown Dep. at 35; and Brown Test. at 8.

That evening at dinner, Rosenberg did ask the group if they wanted to go on the boat trip to the Isla del Cano. Rosenberg Dep. at 231; Brown Test. at 8-9. Rosenberg emphasized that the entire Isla del Cano excursion was presented to the group as completely optional, including the snorkeling aspect of that trip. Rosenberg Dep. at 28. Those opting to go on the excursion could either go snorkeling or stay aboard the boat. Id. After the plan was for everyone to go to the Isla del Cano for hiking and swimming. Id. Rosenberg's description as to how the Isla excursion was presented to the group basically comports with Mrs. Mayer's recollection, as she testified at trial. The group responded favorably to this opportunity. Id. at 21-22; Brown Test. at 9. In fact, Ms. Brown testified that she

did not remember anyone objecting to the Isla del Cano excursion. Id. The group elected to take advantage of this opportunity to go to the Isla del Cano and Rosenberg advised Clark of that. Clark then volunteered that they would be going on a brand new boat which "was faster and fully equipped with life preservers." Id. at 24. He further volunteered that he takes groups to the Isla area daily for snorkeling and that he knew the best places to go. Id. at 25.

III. Events of March 14, 1990

On March 14, 1990, the Mayers and others set out for the Isla del Cano. Passengers on the boat[13] included ten

[13] There was actually two boats that day. One was larger and used to carry the passengers; the other was a skiff which was pulled along behind, used to carry people to and from shore. Deposition of Jonathan Zequeira Barboza (March 30, 1993)

members of the Mayers' group (including Rosenberg and Brown), along with five Marenco guests, as well as several Marenco employees, accompanied by their friends or family. Rosenberg Dep. at 134; Brown Dep. at 56; and Barboza Dep. at 11-13. The boats were operated by Marenco staff, with Alex, a Marenco employee, serving as captain on the larger passenger boat. Barboza Dep. at 13. He was the one responsible for making sure that the boat was operated safely. Id. at 57-58; and Rosenberg Dep. at 132. In addition, Marenco staff assisted people in boarding the boat. Rosenberg Dep. at 132. Other Marenco employees on the trip that day were Nicholas Clark, the naturalist assigned to the Mayers' group; Jonathan Zequeira Barboza, another Marenco

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at 13 and 57; and Def. exh. 37 at 2.

naturalist;[14] and Marenco's manager, Danilo. Besides providing the boats and assorted personnel, Marenco provided snorkeling gear for those who did not have it. Rosenberg Dep. at 23.

Various witnesses uniformly testified that once the boat approached the snorkeling area, which was an area chosen by Clark, he then advised the group of the current, the general area in which the group should stay while snorkeling, and the amount of time available for snorkeling - about forty-five minutes. Brown Dep. at 50; Brown Test. at 10; Rosenberg Dep. at 42-43. Likewise, Clark further advised the group to wear T-shirts to protect their skin from stinging cells.

[14] With permission from Marenco's manager, Danilo, Mr. Barboza accompanied the group even though it was his day off. Barboza Dep. at 11; and Rosenberg Dep. at 41.

Rosenberg Dep. at 42; and Brown Dep. at 50. Mrs. Mayer recalls that additionally Mr. Clark explained how to board the boat after they were through snorkeling. Those were all of the instructions given by Clark. He did not give any information as to the current in the water at that location; nor did he explain the range of tidal motion in the area, or the action of the water against the reef. Nothing was said about anyone being a lookout for those who were snorkeling.

Ms. Brown emphatically denies directing the snorkeling in any way. Brown Test. at 10. That is corroborated by the fact that none of the witnesses present at the time even hinted that she had such a role. Indeed, Mrs. Mayer readily admitted that Ms. Brown gave no instructions to the group before they

entered the water. The only snorkeling instructions which were given were those just described which Nicholas Clark gave. Moreover, Rosenberg confirmed that Ms. Brown did not direct the boat to its snorkeling destination; nor did she have anything to do with the boat's operation. Rosenberg Dep. at 133. Rosenberg further conceded that Ms. Brown's only role on this boat trip was to point out fish and natural habitats in the water. Id. at 158.

Once the snorkeling was underway, Rosenberg stayed on board the boat with binoculars to look for wildlife. Id. at 45. The group which was snorkeling consisted of Ms. Brown, some members of the Mayers' group, some Marenco guest and Messrs. Clark and Barboza, and even perhaps Danilo. Id. at 47 and 147; and

Def. exh. 37. Apparently, Ms. Brown did not observe Mr. Mayer enter the water. See Def. exh. 37 at 1. After she had been in the water an estimated twenty minutes, Ms. Brown first saw Mr. Mayer. Id. She first became aware of Mr. Mayer in the water when she looked up from snorkeling to try and locate Ms. Engquist, another member of the Mayers' group, to point something out to her in the water. Id. Ms. Brown then saw Mr. Mayer approaching "swimming fast, doing the crawl, and lifting his head out of the water to breathe." Id. at 2. Ms. Brown attempted to get his attention to show him something she had just seen in the water, but "he took no notice of [her] and kept swimming hard and fast towards shore." Id. Because of the manner in which he was swimming, Ms. Brown immediately assumed

that Mr. Mayer "was out to get some exercise." Id. She resumed snorkeling. When she noticed Clark, who had been snorkeling nearby, heading back towards the boat, she did the same. Id. Only then did Ms. Brown become aware that there was any concern as to Mr. Mayer's whereabouts. Because it is not germane to the narrow issue of duty which is presently before the court, the court finds it unnecessary to make any factual findings at this point as to the efforts which were made to locate and then attempt to revive Mr. Mayer.

There is one final aspect of the proof which the court cannot disregard, though, because it bears directly on the issue of the Lab's knowledge and that is the testimony of Jean Chapman Neely and Dr. Allen Togut. Those witnesses, called

by the plaintiff, are both avid birders and have been to Marenco on Lab-sponsored tours in 1987.[15]Plaintiff called Ms. Neely and Dr. Togut in an effort to show that the Lab knew or should have known of what the plaintiff believes to be the inadequate safety conditions at Marenco. Plainly, this notice issue is germane to whether the Lab owed a legal duty to Mr. Mayer, and if so, the nature and extent of such duty.

After her trip to Marenco in 1987, Ms. Neely filled out a Voyagers Tour Evaluation specifically decrying "[t]he scandalous lack of safety equipment in the Marenco water craft[.]" Pl. exh. 86. She further exclaimed, that the lack of such

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[15] There were two such trips in 1987, both of which were, incidentally, led by Kenneth Rosenberg. The record is not clear as to whether or not Ms. Neely and Dr. Togut were on the same trip.

equipment "is an accident & lawsuit waiting to happen! Horizontes should lay down the law & get adequate life jackets & flares & emergency radio equipment on those boats when they carry passengers." Id. A copy of this evaluation was provided to Cornell, and on approximately March 1, 1987, Ms. Neely received a written response from the Lab's Executive Director at the time, Charles Walcott. Mr. Walcott responded in a rather pro forma fashion. (Because his response is not lengthy, it is set forth in its entirety in footnote nine below.[16]) Other

[16] Mr. Walcott wrote: "Thank you so much for sending along a copy of your tour evaluation with your comments about the recent Laboratory sponsored trip to Costa Rica. We are always glad to hear from tour participants and your comments were especially helpful. It is extremely important for us to have this kind of feed back [sic] so we can evaluate the tour leaders and the trip in general. I appreciate your taking the time to give us

than this letter, Ms. Neely did not receive any other responses from either the Lab or Voyagers. While on the trip, Ms. Neely also made her concerns known to the tour leader who, again, was Ken Rosenberg.

Dr. Allen Togut also testified as to his experience on a 1987 Lab sponsored trip to Marenco. Dr. Togut was concerned about whether there were a sufficient number of life jackets on the boat which he took to Marenco. Evidently he did not go to the Isla del Cano. He was equally concerned about whether the boat on which he rode could communicate with shore if need be. Although Dr. Togut expressed these concerns to both Rosenberg and Blanton, significantly he never advised

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your opinions and suggestions." Pl. exh. 86

Cornell of the same. Mr. Blanton does not recall one way or the other as to whether he had any contact with people at the Lab regarding either of those complaints. Blanton Dep. III at 38-39. Ms. Brown had absolutely no knowledge of either Dr. Togut's concerns or of Ms. Neely's concerns, however.

Based upon these facts, the court will now consider whether the Lab and/or Ms. Brown owed a duty of care to plaintiff and/or her decedent.

CONCLUSIONS OF LAW

I. Legal Duty?

As Judge McAvoy noted quite early on this litigation, the basic negligence analysis requiring a duty, a breach, causation and damages governs this DOHSA/maritime action. McAvoy Dec. at 11-12 (citing Desmond v. Holland American

Cruises, 1981 AMC 211); see also Doe v. Timofeevsky, Civ. A. No. 94-3101, 1995 WL 21662 (E.D.La. Jan. 18, 1995), AT *2. At this time the court is concerned only with the first element which, unlike foreseeability and causation, is a legal issue.[17] Jaret Ltd. v. United States, 91 Civ. 0181, 1991 U.S. Dist. LEXIS 11021 (S.D.N.Y. Aug. 7, 1991), at *8 (quoting Eiseman v. State, 70 N.Y. 2d 175, 187, 518 N.Y.S.2d 608, 613 (1987)); see also Stagl v. Delta Airlines, Inc., 52 F.3d 463, 469 (2d Cir. 1995)(internal quotations and citations omitted)("[U]nder New York law, the existence and scope of an alleged

[17] Obviously factual issues as to the relationship between the parties are for the jury to decide; but because this case was tried without a jury, the court has made those factual findings, as well as now deciding the legal issue of whether a duty of care existed. See Jaret, supra, at *8 n.4.

tortfeasor's duty is usually a policy-laden declaration reserved for Judges[.]"). In determining the existence and scope of an alleged tortfeasor's duty, there are not "algebraic formula[s]; such decisions are made on a case-by-case basis, informed by a variety of logical, moral, and public policy considerations." Burke v. Warren County Sheriff's Dept., 890 F.Supp. 133, 138 (N.D.N.Y. 1995)(citing Eiseman v. State, 70 N.Y.2d 175,187,518 N.Y.S.2d 608, 614 (1987)). In engaging such an analysis, the court must "weigh[] competing socioeconomic factors in an attempt to distribute `burdens of loss and reparation on a fair, prudent basis[.]" Id. (quoting Palka v. Servicemaster Management Servs. Corp., 83 N.Y.2d 579, 585, 611 N.Y.S. 2d 817, 820 (1994)(other citation omitted). Keeping

in mind these guiding principles, the court will now turn to an examination of the theories of duty posited by plaintiff.

A. The Lab

Plaintiff's argument that the court should find a duty of care on the part of the Lab is based upon several different theories. The first is that the Lab owed a duty of care to plaintiff and/or Mr. Mayer which arose out of the Lab's supposed opportunity to exercise control. Second, plaintiff asserts that Cornell was engaged in a "joint enterprise" with David Blanton d/b/a Voyagers and Ken Rosenberg, and under such a theory of liability the negligence of the latter would be imputed to the Lab. Third, plaintiff Mayer attempts to impose a duty on the Lab based upon its purported prior knowledge of unsafe conditions at Marenco. the court

twill address these arguments seriatim before moving on to the separate but related issue of whether a duty to exercise due care existed on the part of defendant Laura Brown.

1. Opportunity to Control

In responding to plaintiff's opportunity to control arguments, the Lab points out that it merely sponsored this tour and that it did not have the requisite opportunity to control which would give rise to a duty to prevent the alleged negligence. In making this argument, the Lab asserts that it "[e]xercised no control over (a) the selection of Rosenberg as tour leader, (b) the trip itinerary, or (c) the snorkeling activities at Marenco through the presence of Laura Borwn." Defendants' Post-Trial Memorandum ("Def. Memo.") at 9. Before

considering the parties' arguments on the control issue, the court stresses that it disagrees with the Lab's assertion that it exercised no control over the selection of Rosenberg as tour leader. The proof was to the contrary. As detailed above, the Lab, through Ms. Ettinger, was involved in selecting Rosenberg as tour leader. The proof adduced at trial demonstrated that the decision to employ Kenneth Rosenberg as the tour leader on this particular Costa Rica trip was a joint decision between Mr. Blanton of Voyagers and the Lab, through Nora Ettinger. See Rosenberg Dep. at 103-06. In fact, it appears that if the Lab had not initially questioned Blanton's suggestion of Campos as tour leader, then perhaps Campos would have been the leader, and not Rosenberg.

Having clarified that factual point,

the court can now turn its attention to whether the Lab "had sufficient control over the event to be in a position to prevent the negligence." See Vogel, supra, 97 A.D.2d at ___, 470 N.Y.S.2d at 477. The first issue raised by the parties, albeit impliedly, is the scope of that inquiry. In determining whether the Lab owed a duty of care to either one or both of the Mayers, as alluded to earlier, at one point plaintiff suggests that the court should find a duty on the part of the Lab because it "had substantial control in the production of this birding tour." Plaintiff's Post-Trial Memorandum ("Pl. Memo.") at 5. In the course of a few pages, however, plaintiff seems to retreat from that broad statement, contending that "Cornell... had a duty to exercise due care in designing and

conducting this [the snorkeling] facet of the tour[.]" Id. at 9. It can be inferred from that statement that plaintiff believes that Cornell's alleged duty of care arose from its opportunity to control the snorkeling aspect of the tour. In any event, in this court's view the proper inquiry is whether the Lab had "sufficient control over the [snorkeling] event to be in a position to prevent the negligence." See Vogel, 97 A.D.2d at __, 470 N.Y.S. 2d at 477. After all, plaintiff Mayer's negligence claim is based upon the snorkeling incident; therefore it makes little sense for the court to become sidetracked on the issue of whether the Lab had an opportunity to exercise control over any other aspect of this trip. So, for now the court will thus limit its inquiry in accordance with

Vogel.

Starting from the premise that the Lab sponsored this Costa Rica tour, the Lab cites to a line of cases in which courts have uniformly held that a sponsoring organization owes no duty of care to a plaintiff. Some of those cases are not particularly insightful though because of sparse facts and cursory analysis.[18] On the other hand, at least

[18] See, e.g., Johnson v. Cherry Grove Island Mgt., 175 A.D.2d 827, 573 N.Y.S.2d 187 (2nd Dep't 1991)(sponsor of contest in hotel swimming pool owed no duty of care to plaintiff who sustained a back injury when her head hit the bottom the pool where the sponsor had no control over the pool's maintenance and it was not in a position to require depth markings to be placed in the pool); Gibbons v. County Legislature, Oswego County, 161 A.D.2d 1196, 556 N.Y.S. 2d 428 (4th Dep't 1990)(sponsors of salmon derby owed no duty of care to plaintiff's husband who drowned while participating in that derby because even though the sponsors donated money for prizes and promotional material, they did not exercise any control over or supervise the event).

two of the other cases upon which Cornell relies are instructive, because in both of those cases, Vogel, supra and Gehling v. St. George's Univ. School of Medicine, 705 F. Supp. 761 (E.D.N.Y.), aff'd without pub'd opinion, 891 F.2d 277 (2d Cir. 1989), the factual records were fully developed[19] and in Vogel the court engaged in an in depth analysis of sponsorship liability. Therefore, for the moment, the court will focus primarily upon Vogel and Gehling.

In Vogel, the leading New York State case on sponsorship liability, the Appellate Division affirmed a grant of summary judgment in favor of the defendant Miller Brewing Company, which sponsored a slalom skiing event, holding that "mere

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[19] In fact, like the present case, the court in Gehling conducted a non-jury trial. 705 F.Supp. at 763.

sponsorship, absent control, does not render Miller legally responsible." 97 A.D.2d at ___470 N.Y.S.2d at 476. For several reasons, the court declined to find a duty on the part of Miller to ensure the safety of that race. First, the court highlighted the fact, that inter alia, "neither Miller not its agent...was in a position to supervise [the ski slope operator's] running out of the race, since neither party enjoyed the necessary expertise..." Id. at ___ 470 N.Y.S.2d at 477 (citations omitted). Second, the court pointed to the fact that the ski slope operator, and "not Miller[]actually designed, supervised and controlled the event." Id. "[T]here was no direct oral or written communication with Miller concerning the racing series, and ...the design of the slope and supervision and

control over the race was handled exclusively by [the ski slope operator's] employees." Id. Significantly, the court was not influenced in any way by plaintiff's subjective beliefs as to Miller's participation in the event. Id. at __, 470 N.Y.S.2d at 478.

In agreeing that Miller owed no duty as a matter of law, the court also rejected plaintiff's argument "that Miller was negligent because of its failure to assume control over the event." Id. Acknowledging the settled rule that "[t]he duty to control the conduct of others revolves around a special relationship between the defendant, the person whose conduct is required to control, and the person exposed to the harm...[,]" nonetheless, the court found that "[a] realistic assessment of the relations

between plaintiff, [the ski slope operator] and Miller d[id] not give rise to any such special relationship, since there was no reasonable opportunity on the part of Miller to control the tort-feasor." Id. (citation omitted). In reaching this conclusion, the court again focused upon the fact that Miller was not capable of directing or controlling the slalom event. Then, from a policy standpoint, the court reasoned that "to extend legal liability over a sponsor of an athletic event would prove an undue expansion of the sponsorship relationship, the net result of which would be to discourage further participation." Id. Finally, the court found that "[w]hile it cannot seriously be disputed that a sponsor benefits by the promotion of its product, financial gain does not of itself

give rise to a legal obligation." Id. The obvious effect of Vogel is to severely limit the circumstances under which an organization may be held liable in negligence for sponsoring an event at which someone is injured.

Plaintiff Mayer makes no attempt to distinguish Vogel from the present case. Perhaps it is because no obvious distinctions come readily to mind. As in Vogel, there is absolutely nothing in the record suggesting that the Lab, either alone or through its representative Ms. Brown, was in a position to supervise the snorkeling because neither had the requisite expertise. See Vogel, 470 N.Y.S.2d at 477; see also McGrath v. United Hosp., 167 A.D.2d 518, 562 N.Y.S.2d 193 (2nd Dep't 1990)(charitable organization which sponsored an event at

an amusement park, from which it received a portion of the proceeds from the sale of tickets for the rides, did not owe a duty of care to passengers on those rides, because not only did it not supervise, operate, manage, maintain or control those rides, it did not have the necessary expertise to do so). Furthermore, as the evidence conclusively established, once the decision was made to go to the Isla del Cano, Marenco, primarily through its employee, Nicholas Clark, supervised and controlled the snorkeling. Clark offered the Mayers' group the opportunity to accompany some Marenco guests on this excursion; he decided the area for snorkeling, as well as giving all of the instructions which were given about snorkeling that day. Marenco also provided the boats and the snorkeling

equipment. Give that the trial proof clearly showed that Marenco was responsible for this snorkeling excursion and, conversely, that the Lab did not have, indeed could not have had, control over that event, so as to be in a position to avert the claimed negligence, the court cannot find that the Lab owed plaintiff and/or her decedent a duty in this regard. See Dukes v. Bethlehem Cent. School Dist., __A.D.2d____, 629 N.Y.S.2d 97 (3rd Dep't 1995)(school district which was not responsible for preparation of the long jump pit area, and which did not hire the referees who oversaw that event, did not have sufficient control over the event to establish the existence of a special duty on the part of the district).

Gehling bolsters the court's view that the Lab, alone, or through Laura

Brown, did not have sufficient control over the snorkeling trip so as to be in a position to prevent the alleged negligence. Relying heavily upon Vogel, the Gehling court held that a medical school which sponsored a two and a half mile running race was not negligent when a medical student collapsed and died after crossing the finish line. The court found that the school did not owe plaintiff's deceased son a duty to control, monitor or supervise the race, even though, arguably, the school was significantly involved in that race. Not only did the school sponsor that race, but it was run in part on the school's property, with the school's prior knowledge and approval; the school funded the purchase of race T-shirts and trophies; some of the school's employees participated in the race; and

the race was publicized in the school's annual newsletter "which was part of its regular official publications [and] which was fully controlled and edited by high-level administrators...including [the] Vice Chancellor..." 705 F.Supp. at 763 and 766. Even in the face of that seemingly extensive involvement in the race, the court astutely recognized that "[t]here is a distinction between sponsoring at event and being responsible for any actions which take place[;]" and because it was the students on their own initiative, and not the school, who organized, supervised or controlled the race, the court declined to find that the school negligent. Id. at 765-766.

In the present case, as in Gehling, a third-party, Marenco, organized, supervised and controlled the snorkeling -

not the Lab. Moreover, if the Gehling court did not find a duty on the part of the medical school, even though it was intimately involved in many facets of that race, it follows that no duty exists here where the Lab's involvement in the snorkeling event was far more attenuated. Plainly the snorkeling was not done on the Lab's property, nor, as the proof makes clear, did the Lab have prior knowledge and approval of this event. To be sure, as in Gehling, one of the Lab's employees, Ms. Brown, did participate in this event, abut obviously under Gehling that would be insufficient to impose a duty on the part of the Lab, particularly given the fact that the Lab itself had nothing to do with snorkeling trip, combined with the fact that while on that snorkeling excursion Ms. Brown acted like and evidently was

treated like the other tour participants.

Cornell relies upon one additional case which is also worthy of some discussion and that is McAleer v. Smith, 860 F. Supp. 924(D.R.I. 1994). In McAleer, administrators of the estates of sail trainees, who died when the ship on which they were sailing capsized during a Tall Ships Race brought DOHSA and general maritime claims against the race's co-sponsor, the American Sail Training Association ("ATSA"). Following a bench trial, the court was squarely faced with the issue of whether ASTA owed a duty of care to the sail trainees; and the court found that it did. Id. at 930-931. A duty arose in that case because of ASTA's "extensive relationship" with the sail

trainees.[20] Id. at 931. In reaching that conclusion, the court listed the many ways in which ASTA was involved not only with the sail trainees, but with the race itself: (1) For a fee ATSA operated as a placement agency for sail trainees; and through its counselors it provided instructions to the trainees; (2) it "actively promoted the vessel and the Tall Ships Race in which [the trainees] participated[;]' and it "collect[ed] and solicit[ed] funds to support its efforts as sponsor[;]" (3) along with another organization, ATSA served on the Race Committee and the race was conducted pursuant to the rules of those two

[20] To highlight just how extensive that relationship was, the court observed that "ASTA...has a more extensive relationship with sail trainees than a travel agent has with a client." 860 F.Supp. at 931.

organizations; and (4) pursuant to those rules, "ATSA reserved the right to inspect safety conditions aboard the vessels and, indeed, inspected the [ship's] safety equipment prior to the race." Id. Taken together it is easy to see how these factors led the court to conclude that ATSA "owed a duty to [the] sail trainees to exercise due and reasonable care in choosing and approving vessels for sail training to assure that the sail trainees were placed aboard seaworthy, properly manned and safe vessels[,]" and that "ATSA owed a duty to exercise reasonable care in the conduct of the Tall Ships Race so as not to increase the risks inherent in sail training." Id. Thus, the duty which the McAleer court imposed upon the ATSA mirrored those responsibilities which ATSA affirmatively undertook.

At first glance, McAleer might appear to support plaintiff Mayer's position rather than Cornell's. When the facts of McAleer are compared to those of the present case, however, it is obvious that unlike the ATSA, the Lab did not have a relationship with the Mayers which could fairly be characterized as extensive, especially when considered in the context of the snorkeling trip. To reiterate, the Mayers received some promotional material from the Lab - the 1989-90 tour schedule which the Lab was responsible for producing and distributing (but which the tour operators ultimately financed), and two Lab quarterly magazines, only one of which specifically mentioned this trip. Compare Pl. exh. 76 with pl. exh. 77. Shortly after he became aware of this Costa Rica trip, evidently Mr. Mayer did

contact Ms. Ettinger about it; but from that point on, whether or not the Mayers were aware of it, as the proof showed, they arranged this trip through Voyagers. Finally, Ms. Brown, the Lab representative, did accompany the Mayer's group on the snorkeling excursion, but her only part in that trip was to occasionally point out marine life to interested those who were snorkeling.

As the foregoing demonstrates, in stark contrast to ATSA, which undertook at active role in some aspects of the sailing race, such as the safety conditions of the vessels, there is nothing in this record showing that the Lab, on its own or through Ms. Brown, undertook any specific responsibilities as to the organization and operation of this snorkeling trip. Indeed, the proof is to the contrary.

Significantly, neither the Lab nor Ms. Brown provided any snorkeling instruction whatsoever. Nor did the Lab or Ms. Brown have any say in how the snorkeling trip was conducted. The proof convincingly showed that it was Marenco and its employees, and not the Lab or Ms. Brown, which organized and operated the entire snorkeling day trip to the Isla del Cano. Thus, because there is no record proof that the Lab had at "extensive relationship" with the Mayers and/or the snorkeling trip itself, McAleer does not requiring a finding that the Lab owed a duty of care to plaintiff and/or her husband.

Moreover, even if the court was persuaded that the Lab's relationship with the Mayers was so extensive as to form the basis for imposing a duty on these

defendants as to the operation of the snorkeling excursion, liability still would not attach under McAleer. As the Lab emphasizes, the McAleer court did not find ATSA liable for the conditions of the hatches during the race because "any negligence with respect [there] to...[wa]s is no way attributable to ATSA." Id. at 937. The court soundly reasoned, "[o]nce the race was under way, ASTA exercised no control over the operation of the [ship]." Id. Furthermore, explained the court, "All person on board the [ship], including the ASTA counselors, were subject to [the] Captain['s]...command. Thus, any negligence of the master in leaving hatches open, while possible attributable to the owners of the vessel, can not be attributed to ASTA." Id. True, the court's holding in this regard was in the

context of considering whether the ATSA breached its duty of care. But implicit in that holding is, as the Vogel and Gehling courts stressed, the notion that absent control, no duty arises. Hence, the McAleer court could just as easily have held that because the ATSA had no control over the operation of the ship, it had no control over the boat or the snorkeling activity itself, any negligence by Marenco would not be attributable to the Lab.[21]

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[21] Before considering plaintiff's joint enterprise theory, the court is compelled to comment upon two cases which plaintiff believes support a finding of duty - Ruldolph v. Arizona B.A.S.S., 182 Ariz. 622, 898 P.2d 1000 (1995) and Fenwick v. Thayer, 83 Civ. 9337, 1984 WL 1212 (S.D.N.Y. Nov. 15, 1984). Both of those cases are easily distinguishable from the present case so they do not factor into the court's analysis herein. To illustrate, in Fenwick, which involved a jogger and a cyclist who became entangled during a bicycle race in Central Park, the court rejected the City's

argument that under Vogel it had no duty of reasonable care, reasoning that "the City' ownership and supervision of the park and the City's granting a permit for the race present at entirely different relationship [than in Vogel] between the parties." Id. at *4. Likewise, the Fenwick court denied a Rule 12(b)(6) motion for dismissal by the road club which, according to allegations in the complaint, "sponsored the race, provided a `lead car' to insure the safety of participants and spectators, and undertook other necessary organizational aspects of the race." Id. The court expressly found that "[i]n these circumstances, Fenwick has alleged sufficient control over the race to give rise to a duty of care." Id. As discussed above, the Lab had no such control over the snorkeling trip.

Rudolph is also easily distinguishable on its facts. The court found that the sponsor of a bass fishing tournament collided with the jet ski on which she was riding. In stark contrast to the present case, the sponsor there had obtained a permit from the United States Forest Service, and a specific condition thereof was that the sponsor "assure that all participants operate boats in a safe and reasonable manner without endangering the peace and safety of other persons in and about the lake." 182 Ariz. at 623, 898 P.2d at 1001 (internal quotations omitted). Despite that express condition, the sponsor did not patrol the lake to ensure that tournament participants were obeying the rules. Clearly, the Lab had

Because, in essence plaintiff is asserting that the Lab should have controlled the conduct of a third party, Marenco, next the court will briefly examine the law in that regard. "A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." Kazanoff v. U.S., 945 F.2d 32, 36 (2nd Cir. 1991)(internal quotations and citation omitted). As the Second Circuit reiterated in Kazanoff, however:

> New York courts have,...`imposed a duty to control the conduct of others where there is a special relationship: a relationship between defendant and a third

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no such affirmative duty in the present case.

person whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others...Under the appropriate circumstances, the traditional master-servant relationship, the relationship between a parent and child, or the relationship between a common carrier and its passenger are examples of such relationships....'

Id. (quoting Purdy v. Public Adm'r, 72 N.Y.2d 1, 8, 530 N.Y.S.2d 513, 516 (1988)(citations omitted). In the present case, "a realistic assessment of the relations"[22] between the Mayers, Marenco,

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[22] Vogel, supra, 97 A.D.2d at __, 470 N.Y.S.2d at 478 (citation omitted).

and the Lab shows that the Lab did not have a reasonable opportunity to control Marenco, especially once the group decided to take advantage of this snorkeling opportunity and the excursion was underway." Id. at 37. Consequently, because the Lab did not have the "necessary authority or ability to exercise...control over Marenco's conduct," the court cannot find that a duty arose on the part of the Lab based upon "special circumstances." See Purdy, 72 N.Y.2d at 8, 530 N.Y.S.2d at 516.

Up until now the court has focused on the Lab's opportunity to control only the snorkeling activity. But even if the court broadens its inquiry, focusing on the Lab's opportunity to control "the trip's itinerary and incidents

generally,"[23] the result is the same - the Lab did not have the requisite opportunity to control. It is undisputed that the itinerary was set by Rosenberg in conjunction with Voyagers. True, the change in the itinerary to include the snorkeling excursion did not occur until after the group arrived at Marenco; and, Ms. Brown, the Lab representative, was present when the group decided to take advantage of Marenco's offer. However, when the proof as a whole is examined, the court is unable to find that the Lab, either alone or through Ms. Brown, had at opportunity to control the "trip's itinerary and incidents generally."[24]

2. Joint Enterprise

Next, plaintiff contends that the Lab

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[23] McAvoy Dec. at 13.

[24] Id.

owed a duty of care because it engaged in a joint enterprise with Blanton d/b/a Voyagers and Rosenberg. The court has some reservations as to whether this theory is properly before it. First of all, as the parties are well aware, the court explicitly limited the post-trial memoranda to the duty of care issues as articulated by Judge McAvoy - joint enterprise was not one of those issues. And, even if plaintiff did suggest a joint enterprise theory of liability during the trial, it certainly was not the focus of her arguments. Nonetheless, the court will consider whether, as plaintiff urges, the trial proof was sufficient to establish the existence of a joint enterprise between the Lab and Blanton d/b/a Voyagers and Rosenberg, so as to

impose a duty of care on the Lab.[25]

"[A] joint enterprise is at endeavor in which two or more persons unite to achieve a common purpose under such circumstances that each has express or implied authority to act for all with respect to the control of the means or agencies employed to execute the plan[.]" Fairbairn, supra, 107 A.D.2d at ___, 484 N.Y.S.2d at 683 (citation omitted). A joint enterprise then is analogous to a

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[25] When discussing the concept of joint enterprise liability, typically, courts do not speak in terms of the imposition of a duty per se. Instead, (often in the context of a bifurcated trial), a court considers whether the evidence is sufficient to establish a joint enterprise between two defendants so that the negligence of one should be imputed to the other. See, e.g., Fairbairn v. State, 107 A.D.2d 683 (3rd Dep't), aff'd, 66 N.Y.2d 620, 495 N.Y.S.2d 32 (1985). Presumably, though, the underlying assumption in that scenario is a duty of care is inferred from a joint enterprise finding.

partnership. Chen v. Georgetown University, 685, F.Supp. 83, 85 (S.D.N.Y.), aff'd without pub'd opinion, 863 F.2d 45 (2d Cir. 1988)(citation omitted). A joint enterprise cannot be found, though, unless each member has at equal right "to direct or control the others in respect to the joint enterprise." Id. (quoting Fairbairn, 107 A.D.2d at 865, 484 N.Y.S.2d at 683). By way of example, in Fairbairn a child sustained injuries when a canister which he found floating in a pond exploded while he was playing with it. The canister was one of several which the DEA had seized as part of a drug investigation and later discarded in the pond. Because the state police had assisted the DEA in that investigation, the state was also named as a defendant under a joint enterprise

theory. The Fairbairn court enumerated a host of factors which led it to conclude that the DEA and not the State controlled the DEA investigation: (1) "[S]urveillance was provided by the State Police upon request by DEA agents[;]" (2) "[a]n informant contacted DEA agents, not State Police troopers[;]" (3)[a]rrests were made and evidence was seized by DEA agents[;]" (4) "[t]he prisoners were processed in State facilities upon DEA request and a DEA chemist was in charge of the drugs seized[;]" and finally, (5)"while DEA agents made many requests of the State Police,....., the State Police did not make any similar requests of DEA agents." Id. at __, 484 N.Y.S.2d at 683. the fact "[t]hat the State Police might have characterized the investigation as `joint' [was] of no moment" to the court

in light of the foregoing facts. Id. at _, 484 N.Y.S.2d at 684.

Similarly, in Sannella v. Nassau County Fire Comm'n, 87 A.D.2d 625, 448 N.Y.S.2d 241 (2nd Dep't 1982), the defendant fire department was one of nine fire departments which participated in a fire drill where a smoke-making device was deployed which allegedly caused injury to the plaintiff. In affirming at order granting summary judgment in favor of the defendant fire department, the Appellate Division held that liability could not be imputed to that defendant on a joint enterprise theory because plaintiff failed to establish that that particular fire department "was given and retained any measure of control over the operation of the smoke-making device." Id. at 626, 448 N.Y.S.2d at 242. Further reasoned the

court, "[t]o assume such control by its mere participation at the fire drill with eight other fire departments would be conjecture." Id. Thus, Fairbairn and Sannella reinforce the view that mere participation in at event where a plaintiff sustains injury will not suffice to establish at equal right to control or direct - a necessary element of a joint enterprise.

Fairbairn and Sannella are dispositive here. As in both of those cases, the critical equal right to control is missing in this case. As set forth above, the Lab did not have the opportunity to control the tour generally, the itinerary and/or the snorkeling. And, even if the lab had some measure of control, which the court cannot find on this record, certainly the Lab did not

have at equal right to control any of the items just listed. There is ample evidence in the record showing that the right to control the tour, including the itinerary, belong almost exclusively to Voyagers and/or Ken Rosenberg. Before the tour, although the Lab did have some part in selecting Rosenberg as the tour leader, the court cannot find on this record that the Lab had at equal right to control the tour.

Furthermore, even once the tour began, the Lab did not have at equal right to direct or control the tour through its representative, Ms. Brown. Although plaintiff tried mightily during trial to convince this court that Ms. Brown was no different that tour leader Rosenberg in terms of their respective roles, the proof is to the contrary. Given his prior

experience as a Voyagers tour leader, the fact that Voyagers again hired him to lead this tour, and his significant involvement in planning the itinerary, the court is left with the distinct impression that it was Voyagers and/or Rosenberg who had the right to control the tour - not Ms. Brown. After all, at the time Ms. Brown was a Lab research technician, and she went along on this trip as a perk of her job to share her birding expertise and to assist tour leader Rosenberg with the more mundane aspects of group travel, as detailed herein.[26] As an aside, it is interesting to note that Mr. Clark initially approached Ken Rosenberg and not Laura Brown regarding this snorkeling

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[26] As just one example, Mrs. Mayer testified that before arriving at Marenco there had been a mix-up in room assignments and it had fallen to Ms. Brown to remedy that.

opportunity. From that, it certainly appears that Clark assumed (correctly in this court's view), that Rosenberg and not Brown was in charge of the Mayers' group and that he needed Rosenberg's approval before the group could participate in the Marenco snorkeling trip. In any event, as in Sannella, the court cannot find that Ms. Brown's "mere participation" as the Lab representative gave her the necessary right to equal control. See Sannella, 87 A.D.2d at 626, 448 N.Y.S.2d at 242. Lastly, as to the snorkeling (the injury-producing event), likewise, the record is clear that Marenco and perhaps Voyagers through Rosenberg, but certainly not the Lab and/or Ms. Brown, had the right to control that activity. As already explained, Marenco was responsible for every aspect of that venture.

Riley v. Triplex Communications, Inc., 874 S.W.2d 333 (Tex. Ct. Appeals 1994), the only joint enterprise case plaintiff actually discusses in her post-trial memorandum, does not alter the court's opinion. In Riley two police officers sued a bar and a radio station after they were injured when they were hit by a car driven by a drunk driver, who had attended a "ladies night" at a bar. Both the bar and the radio station which sponsored the event were named as defendants. Plaintiff Mayer correctly points out that the court of appeals opined, "It would be difficult to conjure a more appropriate factual scenario to which the legal concept, meaning, and definition of joint enterprise would apply." 874 S.W.2d at 346. Agreeing with the plaintiff, the court of appeals

therefore held that the trial court erred in failing to submit to the jury the issue of whether the bar and the radio station were engaged in a joint enterprise. Id.

What plaintiff Mayer fails to take into account, however, is that on appeal the Supreme Court of Texas reversed the court of appeals on this very issue, explicitly finding that "whether there was a joint business venture or a simple advertiser-client relationship, there is no evidence that [the radio station] had at equal right of control that would give rise to joint enterprise liability." Triples Communications, Inc. v. Riley, 38 Tex. Sup. Ct. J. 765, 900 S.W.2d 716 (1995) (citation omitted). The supreme court further found that "[a]t most, the evidence...indicated that [the radio

station] could make suggestions that the [bar] could adopt or reject. There was no evidence that [the station] had a voice in, or at equal right to control, the provision of alcohol. The evidence of [the station's] general participation in the event is legally insufficient to support the submission of a question regarding joint enterprise." Id. at ___, 900 S.W.2d at 719 (citation omitted). Thus, despite what plaintiff contends, Riley lends further support to this court's finding that the Lab lacked the requisite equal right of control. That is especially so if this court follows the Riley court's approach and limits its inquiry to whether the Lab had at equal right to control the specific injury producing event (the snorkeling) - undoubtedly it did not. Also as in Riley,

insofar as the Lab, through Laura Brown, can be deemed to have generally participated in the snorkeling, that is not sufficient to support a finding that the Lab had at equal right to control or direct that event. Consequently, because plaintiff has not shown to be a preponderance of the evidence that the Lab and at equal right to direct or control the tour, the itinerary and/or the snorkeling, there is absolutely no basis for finding a duty of care on the Lab's part based upon a joint enterprise theory.

3. Notice

As mentioned earlier, plaintiff also advances the theory that the Lab owed she and/or her decedent a duty of care because of the Lab's claimed prior knowledge of unsafe conditions at Marenco. More specifically, plaintiff contends that, at

a minimum, the Lab had a duty to disclose the previously detailed 1987 complaints from Ms. Neely and Dr. Togut. Further, plaintiff contends that the Lab had a "duty to inquire about and rectify the situation[,]" but plaintiff fails to explain what "situation" the Lab purportedly had a duty to rectify. Pl. Memo at 19 (emphasis added). This omission is significant because, as will be more fully discussed below, assuming that the Lab had a duty to "rectify" the "situation" described in the Neely evaluation, that duty was fulfilled, as the Lab asserts, when Marenco purchased new boats after Neely's 1987 trip.

Putting aside for the moment the scope of the duty, if any, owed by the Lab, the Lab counters that because it received only one complaint in 1987, which

pertained to a claimed lack of adequate safety equipment on Marenco boats, it did not have a sufficient quantum of knowledge as would trigger a duty on its part. Further, the Lab hastens to point out that even if receipt of that single complaint gave rise to a duty, it discharged that duty by making Voyagers, which the Lab asserts had at opportunity to control Marenco, aware of its response to that complaint. Moreover, as just noted, the Lab also maintains that any duty which might have existed was extinguished when Marenco purchased the new boats.

Again, before considering the parties' legal arguments, the court must clarify one important factual point - exactly what did the Lab know about the unsafe conditions at Marenco? It is plaintiff's position that the Lab knew of

both Ms. Neely's concerns and those of Dr. Togut. As to Ms. Neely's complain, in the form of the Voyagers evaluation, unquestionably the Lab received a copy of that evaluation, and responded to it in writing. With respect to Dr. togut, however, there is insufficient proof in the record to establish that the Lab was ever made aware of his concerns. Contrary to plaintiff's version of events, no one affiliated with the Lab specifically recalls ever being made aware of Dr. Togut's concerns. All that Mr. Sutcliffe could remember is that he reviewed something from Dr. Togut after Togut's tour, but he does not remember what. Sutcliffe Dep. at 35. Furthermore, Sutcliffe candidly admitted that while Togut's name did "ring[]a bell," he could not remember in what context. Id. In

fact, Mr. Sutcliffe stated that Togut's name could have been familiar to him because he had heard it during someone else's deposition which was taken prior to his. Id. Of more significance, though, is that Dr. Togut emphatically testified during trial that he had no conversations with anyone at the Lab regarding his concerns about the safety conditions at Marenco. Accord Ettinger Dep. at 79-80 (not aware of any complaints by the Toguts regarding Marenco). He spoke only to Rosenberg and Blanton.

In addition, again contrary to plaintiff's depiction of the trial proof, Mr. Blanton did not testify that "it's likely that we discussed it[,]' referring to the Togut complaint and his related informal conversation with Lab personnel." Pl. Memo. at 18 (quoting Blanton Dep.III

at 39). Rather than reading selectively from Blanton's deposition, as the plaintiff does, all of Blanton's testimony on this point must be considered. When that is done, what Blanton testified to is that although "it is likely" that he discussed Togut's concerns with people at the Lab, "it's unknown to [him]" whether or not he actually did. Blanton Dep. III at 39. Indeed, Blanton simply did not remember whether he had any contacts with the Lab about Dr. Togut's concerns. Id. at 39. In light of the foregoing, the court cannot find, as plaintiff would like, that the Lab knew about Dr. Togut's concerns as to the safety conditions at Marenco. Based upon the proof at trial, the court is persuaded that the Lab knew only of Ms. Neely's concerns. Consequently, any duty of care which the

court may find here would, necessarily, have to arise solely from the Lab's knowledge of the Neely evaluation.

As it did when framing the issues in connection with these post-trial submissions, the court continues to rely heavily upon Judge McAvoy's September 24, 1994, bench decision as the framework for its analysis. In that decision, Judge McAvoy stressed that "if Cornell, as a sponsor, had knowledge or notice of unsafe conditions on Marenco," but had no "opportunity for control of the tour," then a duty to act would not arise. McAvoy Dec. at 16. A direct corollary of that proposition, which Judge McAvoy also acknowledge, is that even "if Cornell had some limited control on the trip itinerary or through Ms. Brown, commanded at opportunity to excert [sic] control on the

trip, liability could [not] attach, absent prior knowledge of unsafe conditions." Id. at 16-17. Thus, the law of the case requires that before this successor court can find a duty on the part of the Lab on a notice theory, the court must be convinced that the Lab "had sufficient notice of unsafe conditions, and if, although primarily a sponsor, Cornell had some opportunity to act on that knowledge[.]" Id. at 17 (emphasis added). After carefully examining all of the relevant proof, however, the court is simply unable to find that both of those conditions were satisfied in this case.

a. Quantum of Knowledge

Published case law on the narrow issue of what level of knowledge suffices to trigger a duty to act on the part of a sponsor such as the Lab is, it appears,

non-existent. The court in Fling v. Hollywood Travel and Tours, 765 F.Supp. 1302 (N.D. Ohio 1990), aff'd without pub'd opinion, 933 F.2d 1008 (6th Cir. 1991), was not faced with the precise issue of what level of knowledge is required before a duty to warn is triggered.[27] Neverthe

[27] Fling is one of two cases upon which Chief Judge McAvoy relied to find, that possibly, a duty to warn may arise here. See McAvoy dec. at 16. Creteau v. Liberty Travel, Inc., 195 A.D.2d 1012, 600 N.Y.S.2d 576 (4th Dep't 1993), is the other. While vacationing in Jamaica, the plaintiffs in Creteau were robbed, and one of them raped, at gun point. Claiming negligence in failing to warn of the safety conditions at their hotel, the plaintiffs sued, among others, their travel agent. Stating the settled rule that "where the agent has knowledge of safety factors or where such information is readily available, a travel agent has the duty to inform the customer of those facts...[,]" the court, nonetheless, affirmed the lower court's denial of the agent's motion for summary judgment because discovery had yet to be completed. Id at ___, 600 N.Y.S.2d at 577 (citations omitted). Given the lack of discovery, combined with the fact that there is

less Fling is instructive. Fling involved vacationers who were shot and robbed near their hotel, and who then sued the travel agency which had made the hotel reservations. The travel agency moved for summary judgment. In granting that motion, the court held that the plaintiffs did not prove special circumstances showing that the agency could have foreseen the criminal attack. Instead, the uncontradicted proof revealed that the agency had sent numerous travelers to that hotel both before (5000) and after (15,000) the incident, and that it had not received another report of a threat to a vacationer's safety. 765 F.Supp. at 1306. In addition, the agency had sent one of

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nothing in that decision even hinting at the extent of the travel agent's knowledge therein, obviously Creteau does not shed any light on the quantum of knowledge issue.

its officials to visit the hotel and he averred that the hotel did not appear to be in a dangerous area. Id. The court also pointed to the fact that the agency "did not own, operate, or manage the...hotel." Id. Together these factors led the court to conclude "plaintiffs have failed to provide evidence of `special circumstances' to show that defendants knew or should have known of the foreseeability of a criminal attack necessary to create a duty to issue a warning to the plaintiffs." Id. at 1308. Thus, in Fling the court's analysis centered on what the travel agent did not know, rather than on what it did know. The reason is transparent. Knowledge and duty are two sides of the same coin; a duty to act does not arise absent knowledge.

Applying that reasoning to the present case, the Lab had no duty to warn because, as it persuasively argues, it had now knowledge, from any source, "of concerns about unsafe water conditions, [or of] a high number of water-related accidents, or of negligent conduct by Marenco employees." Def. Memo. at 14. Proof of such knowledge is conspicuously absent from this record. Therefore, the court declines to impose a duty to act on the Lab when it did not have knowledge which would give rise to such a concomitant duty.

In addition, the court cannot ignore the difference in status between the Lab and the defendant in Fling. The defendant in Fling (as well as one of the defendants in Creteau) was a travel agent - not a sponsor such as the Lab. As the Lab is

quick to point out, "Because Cornell is not a travel agent, and neither has nor claims to have specific expertise or knowledge in this ares, the quantum of knowledge of unsafe conditions that is required to give rise to a duty to warn or investigate should be greater[]" than that required of a travel agent. Id. at 13. The court agrees. The Lab, which is part of at institution of higher education, evidently sponsored this ornithology tour as part of its educational mission and as a development project of sorts.[28] The Lab did not make any of the travel arrangements which at travel agent or tour

[28] Given the relatively small fee which the Lab received for each tour participant, it does not appear to the court that the sponsorship of such tours yields a huge profit to the Lab; but usually this sponsorship would engender a great deal of goodwill, the value of which is immeasurable.

operator, such as Voyagers, ordinarily would do. The Lab played no part in planning any part of the itinerary, including selection of Marenco and/or the Isla del Cano as a destination; nor was it involved in selecting the activities in which tour participants would participate, such as snorkeling. The Lab did not arrange for transportation or accommodations. Lab had no such opportunity. As Mr. Sutcliffe bluntly put it, "[I]t was not our tour, it was Dave Blanton's tour[,]" and the evidence supports that view. Sutcliffe Dep. at 32. Voyagers was responsible for nearly every aspect of this tour from making travel arrangements, devising the itinerary, provided a leader at Voyager's own expense, as well as a variety of other matters previously mentioned. By

comparison, at the risk of sounding repetitive, passing reference to this particular tour was made in one of the Lab's quarterly magazines; the Lab was responsible for the publication and dissemination of the schedule of Lab-sponsored tours for 1989-90 (and this Costa Rica tour is listed therein), but it was the tour operators who ultimately bore the cost. Furthermore, the Lab did provide a tour coordinator who referred interested persons to Voyagers; a Lab representative went on this tour; and the Lab received a nominal fee from Voyagers for each tour participant. For the reasons previously discussed, the court does not believe that even in combination these factors establish that the Lab had an opportunity to control the tour. Consequently, the court finds that

plaintiff has not shown by a preponderance of the evidence that the Lab had an opportunity to control the trip generally.

Finally, because up until now the court has been focusing on whether the Lab owed a duty of care to the Mayers, Ms. Brown's role has been peripheral. In accordance with Judge McAvoy's prior decision, however, the court must next examine whether the Lab, "through Ms. Brown, commanded at opportunity to excerpt [sic] control on the trip[.]" Id. at 17 (emphasis added). Throughout the trial plaintiff's counsel was careful to always refer to Ms. Brown as a co-leader, along with Mr. Rosenberg. To be sure, the 1989-90 tour schedule lists the "LEADERS" for the Costa Rica tour as Ken Rosenberg and Laura Borwn. Pl. exh. 3 (emphasis in original). In that same brochure, though,

when Rosenberg is again later described as the "[t]our leader," Ms. brown is described as the "[t]our assistant." Id. At least two of the Voyagers brochures reference only Ken Rosenberg as the leader "leader," pl. exh. 4 and 28; and in one of those brochures Ms. Brown is accurately described as the Lab's representative. Pl. exh. 28. Regardless of what title Ms. Brown was given however, in the end, it is not Ms. Brown's title which is determinative of her opportunity to control the trip, but rather it is her function.[29]

Besides offering her knowledge of ornithology, Ms. Brown was primarily in charge of what Rosenberg colloquially referred to as "creature comforts." Rosenberg Dep. at 38. In other words, as

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the guidelines explained, she was responsible for ensuring that tour participants were satisfied with their accommodations, room assignments and meals. See Def. exh. 23. She also assisted tour participants through customs and with transportation, and she took care of "problems at the hotel desk and the baggage." Id. at 38. After hearing all of the proof, the court is left with the distinct impression that given the fact that Ms. Brown did not speak Spanish and that, unlike Mr. Rosenberg, she had never been hired by a tour operator to lead a tour,[30] Rosenberg left her to take care of the myriad of minor details which must be attended to when traveling with a group to make the tour more enjoyable for the

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[30] And, she has not to this day been hired as such.

participants. The record is void of any proof, however, that Ms. Brown was given responsibility for the actual choice of accommodations, restaurants, mode of transportation and/or the itinerary. Those more fundamental elements of the trip were handled by Voyagers and/or Rosenberg. As a whole, the proof demonstrates that given the relatively limited nature of Ms. Brown's responsibilities on this trip, and the fact that her area of expertise is ornithology (not the travel business and not water activities such as snorkeling), the court cannot find that she had at opportunity to exert control on this trip. Hence, because Ms. Brown had no opportunity to control, such opportunity cannot be imputed to the Lab.

Lastly, the Lab argues that even if

it had a duty to act, that duty was narrowly circumscribed by Ms. Neely's evaluation - the only source of information it had as to unsafe conditions at Marenco. In that evaluation, Ms. Neely mentioned only the lack of adequate life preservers, flares and emergency radio equipment. Pl. exh. 86. So, the Lab, only had a duty to act with respect to those specific complaints,[31] and that it did. It sent a response to Ms. Neely, a copy of which was provided to Voyagers which, as the tour operator, the court agrees, stood in a superior position to control Marenco. Moreover, any duty which may have arisen in light of Ms. Neely's complaint was extinguished when Marenco

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[31] See McAleer, supra, 860 F.Supp. at 936 (letters to ATSA complaining of ship's management had no bearing on plaintiffs' negligence claim pertaining to the ship's seaworthiness.

purchased new boats fully equipped with life jackets and a radio sometime after Neely's 1987 trip.[32] See McAleer, supra, 860 F. Supp. at 936 (ATSA received two letter complaining about ship's management prior to the accident which killed the sail trainees, but those letters did not factor into court's analysis of ATSA's negligence because those concerns "were remedied prior to the...race").

In short, then, for the reasons set forth herein, the court cannot find that the Lab owed a duty of care to plaintiff and/or her decedent.

4. Disclaimer

At the close of the proof, plaintiff sought and was given permission to address the effect, if any, of the disclaimer upon Ms. Brown. Trial Test. at 5. Yet in her

[32] See Rosenberg Dep. at 19; 24-25.

post-trial memorandum, she includes the Lab in her discussion of the disclaimer. See Pl. Memo. at 25-27. To be complete, the court too will address the effect of the disclaimer, if any, upon the Lab, as well as upon Ms. Brown.[33]

This disclaimer argument as to the Lab can be quickly resolved. Chief Judge McAvoy expressly found, "[A]bsent Cornell's prior knowledge and notice..., the Court would give full operation to the disclaimer which appeared on the Voyagers International contract and which expressly applied to Cornell." McAvoy Dec. at 17. He further held, "[t]hat the disclaimer language would be sufficient to insulate defendant Cornell from sharing whatever

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[33] The court will discuss the effect, if any, of the disclaimer on Ms. Brown after it discusses whether she owed a duty to plaintiff and/or her decedent.

liability Marenco may have incurred as a direct owner and operator of the side tour in question." Id. Consistent with those holdings, because this court has just found that the Lab did not have the requisite quantum of knowledge as to the claimed unsafe conditions at Marenco, the court also finds that the disclaimer should be given full force and effect as to the Lab.

B. Ms. Brown

Borrowing from Judge McAvoy's prior decision, plaintiff broadly contends that "Laura Brown owed a duty to the plaintiff and/or her decedent arising out of her tour `leadership' role, including her opportunity to control or alter the events which led to the fatality in question." Pl. Memo. at 20. Of course, Laura Brown vigorously disputes this contention. In

any event, plaintiff first seeks to impose a duty on Ms. Brown on the theory that by her actions Ms. Brown assumed a duty in connection with the snorkeling.[34] This is sometimes referred to as a Good Samaritan claim. See, e.g., Dorking Genetics v. United States, 76 F.3d 1261, ___, 1996 WL 44919,at *6 (2d Cir. 1996). As a fall back, plaintiff asserts that "Laura Brown

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[34] As should be evident by now, from plaintiff's perspective, the Lab owed a duty of care in this case because supposedly it was responsible for a number of important facets of the Costa Rica tour. Plaintiff's argument is far more narrow with respect to Ms. brown, however. Although plaintiff discusses several aspects of the tour for which she believes Ms. Brown was responsible, when specifying the service which Borwn purportedly undertook, plaintiff refers only to snorkeling. Pl. Memo. at 23. Therefore, the court sees no need to address whether Ms. Borwn undertook to provide any service beyond that plaintiff suggests (i.e. snorkeling), especially considering the allegations that it was Mr. Mayer's participation in that activity which resulted in his death.

is subject to the same principles of common law negligence, vis-a-vis duty of care and foreseeability, as is Cornell University." Pl. Memo. at 24. For the reasons set forth below, the court is not persuaded that Ms. Brown assumed a duty of care with respect to snorkeling as to plaintiff and/or her decedent. Nor is the court convinced that Ms. Brown owed a duty of care under more general common law principles of negligence.

1. Assumption of Duty

In his prior decision, Judge McAvoy explicitly stated, "defendant brown is fairly chargeable with duties she expressly undertook either directly by her interactions with plaintiff and decedent or through her position with Cornell[.]" McAvoy Dec. at 19. The parties agree that in analyzing whether Ms. Brown assumed a

duty under that standard, this court should be guided by Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 429 N.Y.S.2d 606(1980). Quoting the venerable Chief Judge Cardozo, in Nallan, the New York Court of Appeals set forth "[t]he formula for determining when `one assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully[]." Id. (quoting Nallan, 50 N.Y.2d at 522, 429 N.Y.S.2d at 615)(quoting in turn H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167-68 (1928)). In particular, Judge Cordozo wrote:

> `If conduct has gone forward to such a state that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working at injury, there exists a relation out of which arises a duty to go forward...The query always is whether the putative wrongdoer has advanced to such a

> point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become instrument for good.'

Id. (emphasis added).

In Nallan at after hours visitor to defendant's office building sustained gunshot injuries while signing a guest book in the building lobby. Ordinarily an attendant would have been in the lobby when plaintiff singed in, but that particular night, he was away from his post attending to janitorial responsibilities in another part of the building. Nallan, 50 N.Y.2d at 513, 429 N.Y.S.2d at 610. The Nallan Court explained that application of Judge Cardozo's formula there "would require plaintiff[]to show not only that defendant...undertook to provide a service and did so negligently, but also that its

conduct in undertaking the service somehow placed plaintiff... in a more vulnerable position than he would have been in had [defendant] never taken any action at all." Id. at 522, 429 N.Y.S.2d at 615. the court further reasoned, "defendant...could be held liable under at `assumed duty' theory only if it was reasonably foreseeable that members of the public, such as Nallon, would rely upon the continued presence of a building attendant in the lobby of the...building and would tailor their own conduct accordingly..." Id. at 522-23, 429 N.Y.S.2d at 615-616 (citation omitted)[35]

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[35] As the court in Leone v. United States, 690 F. Supp. 1182 (E.D.N.Y 1988), astutely observed:

> There seems to be a contradiction in the Court of Appeals' application of the rule and its later formulation of its holding. In the former, the Court stated that the building

The court agrees with Ms. Brown that the proof adduced at trial falls short of satisfying the assumption of duty principles as articulated by Judge Cardozo. At the outset, plaintiff has not shown by a preponderance of the evidence the first element necessary to support a finding that Ms. Brown assumed a duty with respect to snorkeling. Despite what plaintiff suggests, the proof does not

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owner could be held liable if plaintiff showed that owner placed the plaintiff in a more vulnerable position...In the latter, the Court stated that the owner would be liable only if the plaintiff established reliance...These are distinct concepts. The distinction is made clear in the Restatement (Second) of Torts Sections 323 and 324A, where proof of at increase of the risk of harm and proof [of] reliance are listed alternatively, and the proof of either one is sufficient to establish liability...This Court assumes that proof of either at increase of the risk of harm or reliance is sufficient under New York Law.

Id. at 1190 n.5 (citations omitted).

show that Ms. Brown undertook to provide the "service" of snorkeling. See Pl. Memo. at 23. As should be abundantly clear by now, the proof leaves no doubt that that "service" was provided by Marenco.[36]

Furthermore, under any view of the evidence, it cannot be said that Ms. Brown "advanced to such a point as to have launched a force or instrument of harm, or [that she] stopped where inaction is at most a refusal to become at instrument for good." Nallan, 50 N.Y.2d at 522, 429 N.Y.S.2d at 615 (quoting Moch, 247 N.Y. 167-68). Not unlike the other tour participants (with the possible exception of Mr. Mayer), and the Marenco guests and employees who chose to go snorkeling that day, Ms. Brown listened to Nicholas

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[36] See discussion supra at .

Clark's snorkeling instructions and proceeded accordingly. Ms. Brown gave no instructions regarding any aspect of the snorkeling excursion. Marenco staff operated the boats, not Ms. Brown. And Mr. Clark, not Ms. Brown, decided where they would anchor to go snorkeling that day. Ms. Brown snorkeled with the others, occasionally pointing out marine life; that is all. In light of the foregoing, the court simply is unable to find that Ms. Brown undertook to provide the "service" of snorkeling. Put somewhat differently, there is nothing in the record showing that Ms. Brown's conduct on the day of the snorkeling excursion went "forward to such a state that inaction would result, not negatively merely in withholding a benefit, but positively or actively working at injury[.]" See Nallon,

50 N.Y.2d at 522, 429 N.Y.S2d at 615 (emphasis added) (internal quotation and citation omitted). Absent such a showing, Mr. borwn had no duty to go forward under Moch and its progeny. See id.

Plaintiff's argument that she and her husband had a "reasonable expectation " that Laura Brown bore some responsibility for the safety of the tour participants while they were snorkeling is equally unavailing. The court can envision circumstances where such at expectation would be reasonable, but not on this record. There is no evidence, for example, that Mr. Mayer was lulled into a false sense of security by Ms. Brown's presence in the water, or by the fact that she had previously snorkeled. See id. Moreover, under the facts as developed at trial, it was not reasonably foreseeable

for either of the Mayers to expect that because of her prior snorkeling experience[37] and the fact that she too decided to go snorkeling that day, Ms. Brown's role became, in plaintiff's words to serve "as a protection against danger." Pl. Memo. at 24. As previously stressed, Ms. Borwn's area of expertise is ornithology - not snorkeling water-related activities. Furthermore, it was not

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[37] Mrs. Mayer recalled that earlier in the trip that had been a general conversation where those who were interested in snorkeling, including Ms. Brown, commented that they were looking forward to going snorkeling if they had a chance. There was no other proof regarding what either of the Mayers know about Ms. Brown and her prior snorkeling experiences and/or abilities. Aside from this single conversation, where passing reference was made to snorkeling generally, there is nothing in the record that Ms. Brown either said or did anything to give the Mayers the impression that she was particularly knowledgeable about snorkeling, particularly in terms of leading and/or supervising snorkeling trips.

reasonably foreseeable for the Mayers to expect that Ms. Brown had assumed a duty to ensure Mr. Mayer's safety while he was snorkeling just because she had overseen menial, more administrative aspects of the tour along the way. Lastly, assuming arguendo that Ms. Brown did undertake to provide the "service" of snorkeling, and assuming that she did so negligently,[38] the court cannot disregard that there is no proof showing that Mr. Mayer was somehow "placed...in a more vulnerable position than he would have been in had [Brown] never taken any action at all. See Nallon, 50 N.Y.2d at 522, 429 N.Y.S.2d at 615. Accordingly, for all of these reasons, the court cannot find that Ms.

[38] The court emphasizes that these assumptions are for the sake of argument only, and certainly are not supported by the present record.

brown assumed a duty towards either plaintiff at/or he decedent in connection with snorkeling.

Finally, the court is compelled to observe that although somewhat factually analogous, nevertheless, Plaintiff's reliance upon Cohen v. Heritage Motor Tours, Inc., 205 A.D.2d 105, 618 N.Y.S.2d 387 (2nd Dep't 1994), is misplaced. Like the Mayers, in Cohen the plaintiff participated in a travel group tour. While visiting some formal gardens, she sustained injuries when she fell on some stepping stones while traversing a brook. Plaintiff brought suit against the tour company which organized and booked the tour, and which also provided the tour director. The Appellate Division reversed the lower court's granting of summary judgment in favor of the tour operator

because of factual issues as to whether the tour director "directed the tour participants to follow her [the director] across the stones," as plaintiff claimed. Id. at ___ 618 N.Y.S.2d at 389. If the tour director did in fact give such directions, then the court stated, "she assumed a duty to exercise reasonable care since it is claimed that tour participants relied on her to guide them." Id. In contrast, as discussed several times already, Ms. Borwn did not direct the snorkeling. Even Mrs. Mayer testified that Ms. Brown did not speak to the group at all before the those who where snorkeling entered the water; and Mrs. Mayer further verified that Ms. Brown did not give any snorkeling instructions. Thus, because plainly Ms. Brown did not direct the snorkeling, she could not,

under Cohen, be said to have assumed a duty to exercise reasonable care in connection therewith.

2. Common Law Negligence

In addition to relying upon assumption of duty principles, plaintiff also posits that Ms. Brown owed a duty of care under principles of common law negligence. Pl. Memo. at 24. Plaintiff's arguments in this regard are, with a few minor variations, nothing more than a restatement of those which she made in arguing the applicability of the assumption of duty doctrine. The court finds those arguments no more persuasive in this context.

To summarize, after scrutinizing the proof at trial, and reviewing the relevant case law, regardless of the theory of duty urged, the court is forced to conclude

that neither the Lab nor Ms. Brown owed either one or both of the Mayers a duty of care under the particular facts and circumstances of this case.

3. Disclaimer

What is more, because today the court finds that Ms. Brown owed no duty to the plaintiff and/or her decedent, in accordance with Chief Judge McAvoy's prior decision, as it did with respect to the lab, this court must give the disclaimer found on the reverse side of the Voyagers reservation form full force and effect as to Ms. Brown. That is so because Judge McAvoy has previously held, "Absent...a showing [that Ms. Brown "expressly undertook either directly by her interactions with plaintiff and decedent or through her position with Cornell[]" certain duties], the disclaimer clause

which expressly applied to the Cornell [L]aboratory of Ornithology and its representative should be given full effect as to her." McAvoy Dec. at 19. None of plaintiff's post-trial arguments challenging the validity of the disclaimer convince this court that it should stray from Judge McAvoy's earlier holdings on this issue. Consequently, in conformity with Judge McAvoy's prior decision, after finding that Ms. Brown did not "expressly undert[ake] either directly by her interactions with plaintiff and decedent or through her position with cornell," any duties as to plaintiff and/or her decedent, the court gives full effect to the disclaimer contained in the Voyagers Reservation form as to Ms. Brown.

To summarize, for the reasons set forth herein, the court finds that neither

defendant Cornell University, Inc., nor defendant Laura Brown owed a duty to plaintiff Margaret Mayer and/or her deceased husband, James Mayer. Obviously, because plaintiff is unable to establish this first essential element of her DOHSA and survival claims, the defendants are entitled to judgment in their favor. The Clerk of the court is hereby directed to enter judgment in accordance with this order.

IT IS SO ORDERED.

Dated: April __, 1996

Syracuse, New York

Neil P. McCurn
Senior U.S.
District Judge

No. 96-1959

(3)

FILED
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased,

Petitioner,

against

CORNELL UNIVERSITY and LAURA BROWN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari to review a circuit court's interpretation of the Death on the High Seas Act and the availability of an accompanying survival action if the outcome of the case would not change even if all the issues in the petition were to be resolved in Petitioner's favor because, in rulings not challenged in the petition, and which are wholly dispositive of the petitioner's claims, the courts below found as a matter of law that Respondents owed no duty to Petitioner and her descendent?

2. Should this Court grant certiorari to review a circuit court's determination that the locus/maritime nexus Executive Jet test for admiralty jurisdiction is not required when a controlling statute, like DOHSA, applies, when this Court has already confirmed that position in Offshore Logistic, Inc. v. Tallentire?

3. Should this Court grant certiorari to review a circuit court's holding that a survival action based on general maritime law, rather than state law, is available to accompany a DOHSA-based wrongful death action when there is little conflict amongst the circuit courts and this Court has repeatedly declined opportunities to rule on this issue?

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In the
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OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased,

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. Errors, if any, in the courts' rulings below do not effect the outcome of this case.

The district court below held that Respondents Cornell University and Laura Brown did not owe a duty to Petitioner Margaret Mayer or her deceased husband, James Mayer. Memorandum-Decision and Order of the District Court, Entered April 15, 1996 at A-197-198. In a de novo review of the issue (A-11), the Second Circuit reached the same conclusion, holding that Respondents owed no duty to Petitioner or Petitioner's decedent. Summary Order of the Court of Appeals, Entered January 8, 1997 at A-11-21. This

finding, which Petitioner not only does not challenge, but completely ignores in the petition, is totally dispositive of Petitioner's action in its entirety.[1] Whether analyzed under state or federal law and, regardless of whether Petitioner had a right to jury trial, the finding of no legal duty wholly undermines all of Petitioner's claims for relief and renders them moot.

While ignoring this fatal flaw in her claims of error, Petitioner does focus on abstract issues of law, asking this Court to address issues arising under the Death on the High Seas Act ("DOHSA") which, even if decided wholly in her favor, would not affect the lower courts' determination that Respondents did not owe Petitioner or Petitioner's decedent any legal duty. Thus, Petitioner now seeks review of the determinations that 1) DOHSA (and admiralty jurisdiction) applied to her wrongful death claim, and 2) that the accompanying survival action is a maritime law-based claim in admiralty, rather than a state law-based claim in diversity.

In short, Petitioner believes that if the jurisdictional issues had been resolved in her favor, she would have been entitled to have a jury hear either one or both of her claims at trial. Yet even if this Court were to find in Petitioner's favor, that is to say that: 1) admiralty jurisdiction did not apply to the wrongful death claim; and 2) the survival action was a state law-based claim in diversity, the outcome of the case would be no different. If the case had been heard by a jury, the determination that the Respondents owed no duty as a matter of law would have still been decided by a judge, and the case would still have been dismissed on that ground. Thus, even if the Second Circuit erred in finding that admiralty jurisdiction, and specifically DOHSA, applied in the present case, these were harmless errors which did not affect the outcome of the case. See, e.g., Flournoy v. Weiner, 321

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[1] Petitioner's time to challenge the lower courts' rulings concerning the lack of duty has expired. Sup. Ct. R. 13 and 14(1)(a). The lower courts' determinations of this issue are now final. Even if Petitioner had challenged these rulings, the only basis for review would have been the disfavored argument that the lower courts misapplied a properly stated rule of law. See, S.Ct. R. 10 and Palmer v. Hoffman, 318 U.S. 109, 118 (1943).

U.S. 253, 262 (1944) [quoting Murdock v. City of Memphis, 20 Wall. 590, 634, 635 (1874)]: "[T]his Court has said that it will not enter a 'useless and profitless reversal where the same judgment will be rendered by the court below . . .' For like reasons we have refused to answer questions certified to us by a lower federal court where it appears that the answer cannot affect the result." See also Hirabayashi v. United States, 320 U.S. 81, 85 (1943), Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 176 (1934), New York Tel. Co. v. Maltbie, 291 U.S. 645 (1934), and City of New Orleans v. Emsheimer, 181 U.S. 153 (1901).

Respondents respectfully submit that this Court should not grant certiorari to decide abstract principles of law in a case in which the outcome will be unaffected by the Court's decision.

II. The test for admiralty jurisdiction has been clearly and repeatedly articulated by this Court and does not need further review.

A. As this Court found in Executive Jet, and reiterated in Tallentire, DOHSA confers admiralty jurisdiction independent of the two-prong (locus/nexus) Executive Jet test.

The Petitioner argues that the Court of Appeals for the Second Circuit erred in upholding the district court's finding that the first cause of action of the complaint, alleging "negligence, gross negligence or recklessness" was governed by the Death on the High Seas Act ("DOHSA"). 46 U.S.C. § 761. et seq. [2]

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[2] DOHSA, in relevant part, reads:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in

The Petitioner argues that this case should not have been heard as a DOHSA case in admiralty because it does not satisfy the criteria set forth in Executive Jet Aviation, inc, v. Cleveland, 409 U.S. 249 (1972). Petitioner's Brief at 8-13. Mayer argues that the accident in the case at bar does not have a "traditional maritime nexus" so as to satisfy the second prong of a two-prong (locus/nexus) test.

Mayer contends that the Second Circuit in the case at bar and district courts in the Second Circuit have improperly interpreted the explicit language in Executive Jet that emphasizes that the two-prong test is not necessary in cases in which there is clear statutory authority for admiralty jurisdiction (i.e. DOHSA). Executive Jet, 409 U.S. at 268, 271 n. 20, and 274 n.26; accord, Friedman v. Mitsubishi Aircraft International, Inc., 678 F. Supp. 1064 (S.D.N.Y. 1988); Kunreuther v. Outboard Marine Corp. 757 F. Supp. 633 (E.D.Pa. 1991).[3]

Despite the clear language of Executive Jet, the Petitioner argues that the circuits are in conflict as to whether the two-prong Executive Jet test is a predicate for admiralty jurisdiction in DOHSA cases. To support her position, Mayer cites to Miller v. United States, 725 F.2d 1311 (11th Cir.), cert. denied, 469 U.S. 821; and Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F.Supp. 1277 (W.D.Pa. 1983), aff'd 738 F.2d 423 (3d Cir.), cert. denied, 469 U.S. 858. In both cases the court applied the two-prong test and found that the requirements were met. However, both cases relied upon by Petitioner predate this Court's reiterations of its Executive Jet standard.

> admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761.

[3]It is undisputed in the case at bar, that the accident occurred in navigable waters well beyond one maritime league from the shore of any state, territory or dependency. See Petitioner's Brief at 19.

In Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), this Court reiterated its Executive Jet determination that if DOHSA applies by virtue of the location of the accident, then no further test is needed to find admiralty jurisdiction. As this Court explained: "[A]dmiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore." Tallentire, 477 U.S. at 218 (DOHSA applied because deaths occurred when helicopter carrying drilling platform workers crashed on the high seas thirty miles off the Louisiana coast).

The court in Palischak v. Allied Signal Aerospace Co., 893 F. Supp. 341, (D.N.J. 1993), explained the application of the two-prong test this way:

> Any confusion on this issue was cleared up when the Supreme Court issued its decision in Offshore Logistics, Inc. v. Tallentire (citation omitted). In Tallentire, the court made clear that admiralty jurisdiction is expressly provided under DOHSA whenever the accidental death occurred more than a marine league off shore. Id. at 218.

The alleged conflict amongst the circuits which Petitioner argues as a basis for this Court to grant her petition for certiorari is wholly illusory. This issue has in fact been resolved by more recent decisions of this Court. This Court has clearly explained the test in Executive Jet and has since confirmed the application in Tallentire. No further review of this issue is necessary.

B. This Court's holding in Rodrigue is readily distinguishable and is not in conflict with the Second Circuit's ruling in the instant case.

In Point II of her brief (Petitioner's Brief at 14-15), Petitioner claims that the Second Circuit's decision in this case is in conflict with this Court's decision in Rodrigue v. Aetna

Casualty and Surety Co., 395 U.S. 352 (1969). Petitioner then provides a tortured interpretation of Rodrigue in a feeble effort to make her point. However, Rodrigue is readily distinguishable on its facts, and is not in conflict with the Second Circuit's decision in the present case.

In Rodrigue, this Court held that the Outer Continental Shelf Lands Act ("OCSLA"), and not DOHSA, applied in the case of two deaths which had occurred on an artificial drilling platform. Petitioner tries to argue that the holding in Rodrigue supports her claim that the location of the accident alone does not yield DOHSA-based admiralty jurisdiction. Yet as this Court knows, and the Petitioner ignores, the location of the accident in Rodrigue (the drilling platform) is exempted from admiralty jurisdiction by OCSLA:

> The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for the purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures. See Rodrigue (citation omitted). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in Rodrigue, noting that accidents on the artificial islands covered by OCSLA 'had no more connection with the ordinary stuff of admiralty than do accidents on piers.' Id. at 360.

Tallentire, 477 U.S. at 217. In Tallentire, where the accident occurred in the water, and not on an artificial drilling structure, this Court held that "[h]ere, admiralty jurisdiction is expressly provided for under DOHSA because the accidental deaths occurred beyond a marine league from shore." Id. at 218.

In Rodrigue, DOHSA and admiralty jurisdiction did not apply because the accidental deaths had occurred on artificial drilling platforms, a locale exempted from admiralty jurisdiction under OCSLA. The death at issue

in the present case occurred in the water, not on land (real or artificial). Hence Rodrigue has no relevance to the case at bar and no review is warranted.

C. The Second Circuit correctly held that even if DOHSA claims require a nexus to traditional maritime activity, Petitioner's claim meets the requirement.

Petitioners ask this Court to review the Second Circuit ruling that:

> [E]ven if DOHSA claims require a nexus to traditional maritime activity, appellant's claim meets the requirement. The accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers.

Summary Order of the Court of Appeals, Entered January 8, 1997, at A-19-20. Petitioner contends that the finding of a maritime nexus conflicts with this Court's reasoning in Sisson v. Ruby, 497 U.S. 358 (1990) and its progeny.

As an threshold issue, this Court ought not consider this issue because it seeks review of a purported misapplication of a rule of law to the facts at bar. Rule 10 of the rules of this Court explain:"[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" (emphasis added). Even if the two-prong test ought to be applied, the application of that test to the facts in the case is not a proper subject for this Court's review.

However, assuming, arguendo, that the two-prong test of Executive Jet is required, and assuming that the issue of its application to the facts in this case is appropriate for this Court's consideration pursuant to its rules, the Second Circuit did not err in concluding that the present case meets both the location and nexus prongs of the test.

First, as the Petitioner concedes (Petitioner's Brief at 19), the locus test is clearly satisfied as the incident occurred in navigable waters some 8-13 miles off the coast of Costa Rica.

Second, the activity engaged in at the time was a maritime commercial venture. The tourists, including the Mayers, were paying guests at the Marenco Biological Station. The boat trip was on an ocean-going boat, which was owned and operated by Marenco for the benefit of their paying guests. See Findings of Fact in the Memorandum-Decision and Order of the District Court, Entered April 15, 1996 at A-84-117. As the Second Circuit characterized the activity: "[t]he accident occurred in navigable waters in the course of activities connected with a maritime commercial undertaking, ocean touring of passengers." Summary Order of the Court of Appeals, Entered January 8, 1997, at A-20.

The inquiry regarding whether a maritime nexus exists must focus on the general nature of the activity at issue, not the particulars of the single incident. See Sisson v. Ruby, 497 U.S. 358 (1990). Petitioner's Brief is devoid of caselaw to support her claim that the snorkeling activity does not satisfy the "nexus" requirement. Indeed, a number of cases decided prior to the present case have recognized that similar activities satisfy the nexus requirement. See Kuntz v Windjammer "Barefoot" Cruises, 573 F.Supp. 1277 (nexus test is satisfied where cruise ship passenger drowned while on a scuba diving excursion); Moyer v. Rederi, 645 F.Supp. 620 (S.D.Fla. 1986) (nexus test is satisfied where cruise ship passenger suffered heart attack while on a snorkeling expedition).

Again, without caselaw to substantiate her argument, Petitioner contends in a conclusory fashion that all of this is irrelevant because Respondents' alleged negligence was "land-based" and thus does not satisfy the maritime nexus requirement.[4] Contrary to Petitioner's baseless position,

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[4] To support this position, Petitioner for the first time concedes that Respondents did not control the boat or the snorkeling activity whatsoever. Petitioner's Brief at 18-19. It is ironic that, now, apparently because it suits her purposes, Petitioner concedes this fact, when, from the very beginning of this case, she has argued exactly the opposite. And still, she

numerous courts sitting in admiralty jurisdiction have determined that the "land-based" activities of defendants satisfy the nexus requirement. See, e.g., Miller v. United States, 725 F.2d 1311.

This court should not review the issue because Petitioner seeks review of the Second Circuit's application of established law to the facts in the case. Moreover, even if the satisfaction of the locus/nexus test were a prerequisite for admiralty jurisdiction, the Second Circuit correctly held that the test was satisfied. Petitioner has offered no caselaw, other authority, or a well-reasoned argument which contradicts that holding.

III. There is insufficient conflict amongst the circuits to warrant this Court's review of whether a state law-based survival action may accompany a DOHSA-based wrongful death claim.

In Points V and VI, (Petitioner's Brief at 20-30), Petitioner claims that the position of the Second Circuit is in direct conflict with that of the Third Circuit regarding the availability of a state law survival action when the companion wrongful death action is governed by DOHSA. Petitioner also argues that the Second Circuit position on this issue conflicts with decisions of this Court.

Of the three Third Circuit cases cited by Petitioner, one court did not even consider the issue. The rulings of the other two cases are in conflict with the position adopted by the First, Second, and Fifth Circuits, and other numerous district courts regarding companion state survival actions.[5] These two

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wants to have it both ways: in the facts set forth in this petition, she still insinuates that Cornell and Brown had control over the snorkeling activity. (i.e. "Rosenberg and Brown decided that he would stay on the boat, and Brown would go into the water with the snorkelers." Petitioner's Brief at 4).

[5] See, e.g., Preston v. Frantz, 11 F.3d 357 (2d Cir. 1993), cert. denied 115 S. Ct. 1060 (1994); Wahlstrom v. Kawasaki, 4 F.3d 1084 (2d Cir. 1993), cert. denied 510 U.S. 1114, 114 S. Ct. 1060 (1994); Azzopardi v. Ocean

cases alone do not create sufficient conflict to warrant this Court's review of this issue.

In the first case relied on by Petitioner, Dugas v. National Aircraft Corp, 438 F.2d 1386 (3d Cir. 1971), the appellate court considered whether DOHSA provided the exclusive remedy for recovery and consequently precluded any survival action. The court, after going to great lengths to explain that wrongful death actions and survival actions are distinct causes of action, held that DOHSA did not preclude the survival action based on state law. Importantly, the Dugas court did not focus on whether a state law-based survival action versus a general maritime law-based survival action could be brought by a DOHSA plaintiff. Instead it considered only whether any survival action was precluded by DOHSA. It never pondered the question at issue here, whether a general maritime law-based survival action, rather than a state law-based claim, is appropriate when the accompanying wrongful death action is governed by DOHSA.

In the second case cited by Petitioner, the district court in Kuntz v. Windjammer "Barefoot" Cruises Ltd., 573 F.Supp. 1277, 1286, explained that:

> In summary we hold that a survival action based on state law may be prosecuted with a claim under DOHSA in this circuit pursuant to Dugas v. National Aircraft Corporation, and post-Moragne, a survival action based on general maritime law may be coupled with a DOHSA claim for wrongful death.

The Kuntz court then reasoned that its "fidelity to the common law tradition" required it to follow Dugas and so it applied the Pennsylvania survival statute to the plaintiff's claim. Id. Interestingly, the Kuntz court noted that, "[w]e wish to point out that even if our decision to follow Dugas and apply the Pennsylvania Act is erroneous, the error is of no consequence because the same damages are recoverable in a survival action

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Drilling and Exploration Co., 742 F.2d 890 (5th Cir. 1984); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974).

based on maritime law following the decision in Moragne." Id.

More recently in the Third Circuit, the district court in Palischak v. Allied Signal Aerospace Company, 893 F.Supp. 341 (D.N.J. 1995), reviewed the evolution of the Third Circuit's position on this issue and found it lacking. In Palischak, the plaintiff brought claims for conscious pain and suffering under the New Jersey survival statute and, in the alternate, under general maritime law. After citing to a long list of district court and circuit court decisions which recognize a general maritime law-based survival action, the Palischak court concluded that it was bound by Dugas and Kuntz to apply the state law. "Therefore, although we feel the better view is that the survival action arises from general maritime law, based on Dugas and Kuntz, we will apply the New Jersey Survival Act." Id. at 349. Plainly, Petitioner's argument at bar does not warrant Supreme Court review, as even a district court in the Third Circuit recognizes that the better position on this issue is the one held by the First, Second, and Fifth Circuits, rather than the one held by its own Third Circuit.

Petitioner's contention that the Second Circuit's position conflicts with decisions of this Court is similarly without merit. Petitioner's Brief at 23-30. Relying primarily on this Court's decision in Yamaha Motor Corp. et al. v. Calhoun, _U.S._, 116 S.Ct. 619 (1996), the Petitioner claims that the Second Circuit erred "in failing to recognize that Yamaha completely vitiates its holding in Preston." Petitioner's Brief at 28. This is simply false. Preston was a DOHSA case, whereas Yamaha considered the applicability of state law actions when accidents occur within territorial waters, not on the high seas.

The Yamaha court granted certiorari to consider whether the federal maritime claim for wrongful death recognized in Moragne supplies the exclusive remedy in cases involving the death of nonseamen in territorial waters.[6] The

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6 "We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was Moragne's

distinction is a crucial one because, as this Court has recognized, states retain an interest in regulating activities in their territorial waters and federal maritime law has long accommodated those interests. The holding in Yamaha simply preserves the application of state statutes to deaths occurring in territorial waters, it has no application or relevance in cases such as the present one in which the death occurred on the high seas.

Petitioner fails to identify any Second Circuit decisions which conflict with decisions of this Court on the issue of the application of general maritime law survival claims rather than state law-based survival claims in DOHSA actions. Indeed, this Court expressly declined to decide this issue in Tallentire. Petitioner has failed to present any compelling reason why this Court should consider the issue now.

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design to terminate recourse to state remedies when nonseafarers meet death in territorial waters." Yamaha at footnote 8.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondents' brief in opposition is characterized more by an eagerness to disparage petitioner than by a reasoned response to petitioner's legal arguments. Petitioner feels compelled not only to respond to the new arguments raised by respondents, and to draw the Court's attention to a relevant case decided since petitioner's initial filing, but also to correct several assertions contained in the opposition brief.

I

The finding below that respondents owed no duty to petitioner or her decedent under New York law does not render the case moot. First, should this Court find that DOHSA does not apply, then under the Erie doctrine a federal court sitting in New York would apply New York's choice of law provisions. In tort cases, New York uses an "interest analysis" approach to determine which jurisdiction has "the greatest concern with the specific issue raised in the litigation." Babcock v. Jackson, 12 N.Y.2d 473 (1963); see also Schultz v. Boy Scouts of America, 65 N.Y.2d 189 (1985). For wrongful death and related survival claims, New York precedent overwhelmingly favors application of the substantive law of the decedent's domicile, in this case, Pennsylvania. See Miller v. Miller, 22 N.Y.2d 12 (1968).

Pennsylvania law differs significantly from New York law on the question of duty. In Pennsylvania, foreseeability plays a larger part in determining the existence of duty than it does in New York. See, e.g., Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3rd Cir. 1993). Thus, the court in Miller v. Group Voyagers, Inc., 912 F.Supp. 164 (E.D.Pa. 1996) noted that while the existence of duty depends on a

"relationship" between the parties, "foreseeability is the basis on which a duty is established." Id. at 167. A court applying Pennsylvania tort law might well find the existence of a duty. The case, therefore, is not moot.

II

Petitioner wishes to draw to the Court's attention a case decided subsequent to petitioner's initial filing that reinforces her position that where a state claim is brought in diversity, which gives an independent basis for federal court jurisdiction, there is a Seventh Amendment right to a jury trial. In Ghotra v. Bandila Shipping Co., 113 F.3d 1050 (9th Cir. 1997), decided on May 13, 1997, the Court of Appeals for the Ninth Circuit concluded that an action brought under state law and based in diversity preserves the plaintiff's Seventh Amendment right to a jury trial for claims that could have been brought at common law, even against claims of federal maritime jurisdiction.

III

With respect to respondents' argument that the petition ought to be denied under Rule 10 of the rules of this Court, the court of appeals' statement of the law regarding the two-prong Executive Jet test was in fact wrong. This Court ruled in

Grubart, Inc. v. Great L.D.& D. Co., 513 U.S.527 (1995) that the proper inquiry under the second prong, relation to traditional maritime activity, is whether the defendant's activity, not that of non-defendants, is maritime in nature.

IV

Finally, respondents' insistence that insufficient conflict exists among the circuits to justify this Court's review of whether a state law-based survival claim may supplement an action under DOHSA serves to prove petitioner's point. Respondents contend that the First and Fifth Circuits support the Second Circuit's position that the federal maritime survival action precludes a state survival action. In fact, the Fifth Circuit, like the Ninth, has ruled that a DOHSA plaintiff may also recover damages under a state survival statute.

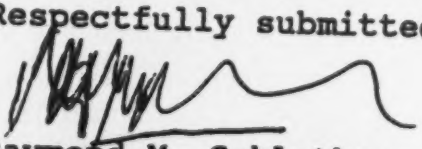
In Snyder v Whittaker Corp., 839 F.2d 1085 (1988), decedent's representatives brought claims under both DOHSA and the Texas survival statute. The court of appeals ruled that "[a]lthough DOHSA does not provide damages for a decedent's pain and suffering, a DOHSA plaintiff may recover such damages under a state survival statute." Id. at 1092. The Fifth Circuit's true position renders the existing conflict between the circuits

more than sufficient to warrant this Court's review.

Moreover, the analysis here of issues of mootness and right to a jury trial demonstrate once again one of the most compelling reasons this Court should review this case -- confusion reigns below. The same putative DOHSA plaintiff could receive substantially differing results depending upon which circuit governs his DOHSA and state survival claims. Such uncertainty and disharmony warrant this Court's review.

Because respondent has made no dispositive or substantial arguments in opposition, and for the reasons set forth in the petition, petitioner respectfully submits that the petition for a writ of certiorari ought to be granted.

Respectfully submitted,



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